No. SC83745

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

vs.

KENNETH BAUMRUK,

Appellant.

Appeal from the Circuit Court of St. Louis County, Mo.
Twenty-First Judicial Circuit
The Honorable Mark D. Seigel, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for murder in the first degree, §565.020, RSMo 2000, obtained in the Circuit Court of St. Louis County and for which appellant was sentenced to death. Because of that sentence, jurisdiction over this appeal lies exclusively with the Missouri Supreme Court. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Kenneth Baumruk, was charged by indictment filed in the St. Louis County Circuit Court on March 30, 1998, with one count of murder in the first degree, eight counts of assault in the first degree, and nine counts of armed criminal action (L.F.17-23).[1] These charges had been filed earlier, but had been dismissed pursuant to this Court's order in State ex rel Baumruk v. Belt, 964 S.W.2d 443 (Mo.banc 1998), which is discussed in Point V of this brief. The case was assigned to the Honorable Philip J. Sweeney (L.F.1). However, appellant filed a motion for a change of judge, which was granted, and the case was reassigned to the Honorable Mark D. Seigel (L.F.1).

On September 25, 2000, the trial court held a hearing on appellant's competency to stand trial (Tr.243). On December 1, 2000, the trial court found that appellant was competent (L.F.754-762).

The cause went to trial on May 7, 2001, on the charge of murder in the first degree (Tr.992). The sufficiency of the evidence to support appellant's conviction is not in dispute. Viewed in the light most favorable to the verdict, the following evidence was adduced during the guilt phase: Appellant and the murder victim, Mary Baumruk, were married in 1977, and lived in Florissant, Missouri (Tr.1714). They began having marital difficulties and Mary Baumruk filed for divorce in August of 1990 (Tr.1716,1855-

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[1]The record on appeal cited in this brief consists of the legal file ("L.F."); the transcript prepared by Hazelwood ("Tr."); the transcript prepared by Hammack ("Hammack-Tr."); the transcript prepared by Lunatto ("Lunatto-Tr.") ; and various exhibits as designated.

1858). At about that same time, Mary Baumruk filed an adult abuse action and appellant was removed from their home (Tr. 1716,1909-1910).

In 1992, appellant, who had worked in the St. Louis area for McDonnell Douglas Corporation, began working as a manufacturing engineer for Boeing in Everett, Washington (Tr.1775-1778). In January of that year, he went to the Gun Works in Redmond, Washington and told an employee there, George Barnes, that he wanted to buy two handguns for personal defense (Tr.1730-1732). He said that one was for him and the other was for his wife (Tr.1732). Appellant said that he did not want expensive durable guns because they were not going to be used on target ranges (Tr.1753). Appellant purchased two .38 caliber Taurus model 85 revolvers and ammunition, and he picked them up after the State of Washington's five day waiting period for purchasing handguns had passed (Tr.1734-1742,1839; State's Exhibits 11-15).

Appellant frequently discussed with his co-workers at Boeing his unhappiness with the way that his divorce was proceeding (Tr. 778-1780,1816). He repeatedly told them that if everything did not go his way he should shoot his wife (whom he always referred to as "the bitch") between her eyes and should shoot the lawyers and the judge (Tr.1778-1780,1816-1817). This talk continued through the time that appellant went to St. Louis for the trial of his divorce case (Tr.1817). However, his co-workers did not take these threats seriously (Tr.1816).

Appellant's divorce case was set for trial at about 9:30 a.m. in Division 38 of the St. Louis County Circuit Court before the Honorable Samuel J. Hais (Tr.1871-1873). At about 9:00 a.m. that day, appellant's divorce counsel, Garry Seltzer, arrived at the St. Louis County Courthouse, saw appellant, and discussed the case with him (Tr.1925-1926). At about this same time, Mary Baumruk's counsel, Scott Pollard, met with her and told her that he had just discovered a potential conflict of interest because in looking through records of appellant's previous divorce he saw that he had represented appellant in a

motion to modify (Tr. 1870). Pollard discussed this matter with Seltzer (Tr. 1926). They then met with Judge Hais in his chambers (Tr. 1926). Judge Hais indicated that the case could continue if all of the parties agreed on the record to waive any conflict of interest (Tr. 1927). Selter then discussed this matter with appellant (Tr. 1927).

When the case started, appellant, Seltzer, Mary Baumruk and Pollard were sitting together at a table in the front of the courtroom (Tr. 1723; State's Exhibit17). Judge Hais and the attorneys made a record about waiving the conflict of interest, and Seltzer indicated that appellant was willing to waive the conflict (State's Exhibit 8).[2] As Mary Baumruk stated on the record that she was willing to waive the conflict of interest, appellant reached into a briefcase, pulled out his two pistols, leaned over the table, aimed one pistol at Mary Baumruk and shot her in the neck, causing her to collapse in her chair (Tr. 1679,1705,1724-1725,1790,1879; State's Exhibits 8, 20-25).

As the numerous people in the courtroom attempted to flee, appellant turned his attention to Pollard (Tr. 1726,1879). He aimed a gun at Pollard and shot him in the chest as Pollard attempted to back away from the table were they had been seated (Tr. 1879-1881). Appellant then aimed at Seltzer and shot him in the chest, left arm and back (Tr. 1932, 1937-1938). Appellant turned his attention back to Mary Baumruk. He walked around the table to her, placed a pistol against the base of her head and shot her again (Tr. 1798,1804,1933). This shot killed her (Tr. 1804).

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[2]State's Exhibit 8 is the audio recording of the murder that was made by the court's clerk (Tr.1675-1676).

As Judge Hais fled out the back door of the courtroom, appellant shot at and pursued him (Tr. 1679-1680,1883,1949). Attorney Bruce Hilton was in the hallway behind the courtroom when Judge Hais, who was not wearing shoes, slammed the door open and fell down (Tr. 1946-1950). Hilton, who had heard the gunfire, got Judge Hais onto his feet, pushed him through the clerk's office and into his chambers, locked the door from the outside, and pulled the door closed (Tr. 1949,1952). Hilton then went back out to the clerk's door to the hallway (Tr. 1950). He saw appellant standing about four or five feet away from him, pointing two guns at him (Tr. 1951). He closed the door to the clerk's office and waited for help to arrive (Tr. 1952).

Meanwhile, Officer Steven Salamon, a St. Louis County Police Officer who was in the building to testify in an unrelated case, went to Division 38 because he heard shooting and screaming (Tr. 1959). As he approached the doorway to that courtroom, people told him, "he's shooting in there" (Tr. 1959-1960). He looked through the glass in the door to the Division 38 courtroom and saw Mary Baumruk sitting motionless in a chair (Tr. 1960; State's Exhibit 5). He entered that courtroom with his gun drawn and saw some people hiding on the floor under the pews (Tr. 1960-1961). Officer Salamon asked "where he is at," and was told that "he" had run out the back door of the courtroom (Tr. 1961).

Officer Salamon and Officer Smith, a Jennings Police Officer who had joined him, went out that door and down the hallway searching for the shooter (Tr. 1962,1965). As they entered the hallway, Officer Salamon heard a gunshot coming from his left (Tr. 1962). The officers went in that direction (Tr. 1964).

When they reached room 201, they saw appellant coming around a corner (Tr. 1966). Appellant was dressed like a bailiff, and was armed (Tr. 1966-1967,1984). Appellant used the corner as cover, aimed the gun in his left hand at Officer Salamon, and fired a shot at him (Tr. 1967). Officer Salamon

dropped to the floor and got ready to return fire, but did not fire because appellant had disappeared back around the corner (Tr. 1967).

Officers Salamon and Smith crawled down the hallway looking for appellant (Tr. 1968). When they reached the door to the clerk's office for Division 36, they found that it was closed (Tr. 1968-1969). Officer Salamon yelled, "Open the door, it's the police" (Tr. 1969). A voice from inside the clerk's office said, "I've been shot" (Tr. 1969). The officers went into the office and found that the bailiff for Division 36, Fred Nicolay, had been shot in the left shoulder (Tr. 1970).

Officer Salamon heard someone in the hallway yell, "he's out in the hallway," so he went to investigate (Tr. 1970). He heard a number of shots fired almost simultaneously and then saw that appellant had been apprehended in the hall outside of Division 38 (Tr. 1971). Appellant had been shot and was lying on the ground (Tr. 1971,1976).

After an officer handcuffed appellant, Officer Salamon searched appellant and seized ammunition that was in the outer pockets of appellant's sports jacket (Tr. 1972). Appellant calmly asked Officer Salamon, "Did I get her, did I kill her" (Tr. 1973-1974).

The police searched appellant's briefcase, which he had left in the Division 38 courtroom (Tr. 1828). Inside it, they found a box of .38 caliber ammunition, papers pertaining to the divorce litigation that appellant had failed to fill out, and appellant's airline ticket from Seattle to St. Louis (Tr. 1828-1830; State's Exhibits 25, 26A-C and F).

Appellant did not testify on his own behalf or present any guilt-phase evidence. At the close of the evidence, instructions and argument of counsel, the jury found that appellant was guilty as charged (L.F. 1008).

In the penalty phase, the State presented additional evidence about appellant's attack on numerous

law enforcement officers and court personnel after the murder, and evidence about Mary Baumruk (Tr. 2050-2116; Hammack-Tr.3-80; L.F. 659-772). Appellant presented evidence that he allegedly suffered from dementia due to gunshot wounds to his head, which were inflicted when he attempted to murder numerous law enforcement officers (Hammack-Tr.26-34, 114-158; Tr. 2145-2165). His expert, Dr. Daniel Cuneo, also testified that appellant's condition had dramatically improved between 1993 and 1999 and that appellant had been able to file pro se federal lawsuits and motions (Tr. 2170, 2181-2183). He said, though, that he thought that appellant was "confabulating" when he said that he remembered committing the crimes (Tr. 2203-2207).

At the close of the evidence, instructions and argument of counsel, the jury found that ten statutory aggravating circumstances existed and recommended a sentence of death (L.F. 1029). The trial court later sentenced appellant to death (L.F. 1046).

ARGUMENT

I. and II.

The trial court did not abuse its discretion when it denied appellant's motions for a change of venue because appellant received a fair trial in the St. Louis County Courthouse in that the jurors indicated that they could be fair and impartial and there was no evidence of a huge wave of passion and bitter prejudice against appellant in St. Louis County at the time of his trial, which occurred nearly a decade after the murder.

In appellant's first two points, he alleges that the trial court abused its discretion when it denied his motions for a change of venue because there had been extensive publicity about the case after the murder and because trying the case in St. Louis County posed created a "risk" of "prejudice passion, excitement, and tyrannical power" on account of the fact that the crime scene was in the same huge building as the trial (App.Br. 50, 55; L.F. 74-75, Tr. 6-10,992-994,1502). Appellant's argument, though, ignores the fact that the passage of nearly a decade since the crime caused passions and excitement of the people in St. Louis County to cool.

The record shows that while appellant murdered his wife in May of 1992, his trial did occur until May of 2001 (Tr. 992, 1660-1678). About 99 people showed up for jury service (Tr. 100,1050,1097,1139,1194,1257,1301,1349,1405,1467). Out of that number, about 63 had heard about the case in the media (Tr. 1010,1011,1031,1071,1077,1081, 1110,1113,1116,1119,1125,1146,1154,1157,1160,1166,1171,1175,1201,1206,1208,1212,1226,1228, 1264,1269,1275,1278,1283,1288,1311,1315,1317,1319,1323,1326,1329,1357,1366,1374,1378,1413, 1420,1426,1430,1432,1440,1473,1476,1479,1483,1484,1488,1491,1493). Of these people, only about 18 had formed opinions about appellant's guilt (Tr.

1018,1032,1078,1118,1158,1202,1270,1287,1288,1317,1321,1328,1332,1359,1362,1372,1424,1483). Of these people, only about 8 people were excused for cause on the ground that they could not set aside the opinions that they had formed and decide the case based on the evidence that was adduced in court (Tr. 1019,1118,1203,1290,1317,1322,1328,1359).

The 12 persons who sat on appellant's jury consisted of about 5 people who had not heard about the case, 6 people who had heard about the case but had not formed any opinions, and one person who had heard about the case and formed an opinion but could disregard that opinion and decide the case based on the evidence that was adduced (Tr. 1015,1113,1174-1176, 1207,1209,1265-1267,1270-1271; L.F. 970-983).[3]

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[3] Appellant refers to juror Johnson as remembering the attack (App.Br.56). However, while Johnson initially said that she remembered the attack, she next stated that she heard about an attack that occurred in about 2000, rather than in 1992 (Tr. 1069). Thus, her recollection was apparently of a different incident.

This case was not tried in Division 38 of the St. Louis County Courthouse, where the murder had occurred (Tr. 1662). It was tried in Division 3 (Tr. 1).

Whether to grant or deny a change of venue rests within the trial court's discretion, and its ruling will not be disturbed absent an abuse of discretion. State v. Feltrop, 803 S.W.2d 1, 6 (Mo.banc 1991). A trial court will be found to have abused its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the actions taken by the trial court, then it cannot be said that the trial court abused its discretion." State v. Brown, 939 S.W.2d 882, 883 (Mo.banc 1997).

The relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. Patton v. Yount, 467 U.S. 1025,1035 (1984). An abuse of discretion exists only when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. State v. Feltrop,

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Appellant also refers to polling that was done in St. Louis County by defense witness Dr. Kenneth Warren even though it was of almost no value in that it was done about 3 years before appellant's trial and the trial court could have found Dr. Warren's results to be incredible in light of the suspect practices that he utilized (App.Br. 58; Tr. 168-224).

supra at 6. The trial court is in a better position than the appellate court to assess the effect of publicity on the minds of the community and to determine whether the residents of the county are so prejudiced against the defendant that a fair trial would not be possible. Id.

It is not required that the jurors be totally ignorant of the facts and issues involved. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id., 366 U.S. at 722-723.

Thus, it is normally within the legitimate province of a trial court to conclude that the jurors were not prejudiced, regardless of whatever publicity they have seen, State v. Schneider, 736 S.W.2d 392, 403 (Mo.banc 1987), as long as the jurors state that they can be fair and impartial. State v. Kinder, 942 S.W.2d 313,321-322 (Mo.banc 1996).

Appellant attempts to alter the standard of review by invoking a constitutional doctrine first pronounced in Irvin v. Dowd, supra 366 U.S. at 723-725: that, in some circumstances involving extraordinary pretrial publicity or widespread public hostility toward the defendant, the testimony by prospective jurors that they could be fair and impartial should not be believed. See also Patton v. Yount,

supra 467 U.S. at 1031-1032; and Murphy v. Florida, 421 U.S. 794, 798-800 (1975). This doctrine requires a high threshold of proof that is rarely applicable and is reserved for extreme situations. Pruett v. Norris, 153 F.3d 579, 585 (8th Cir. 1998).

> In order for the reviewing court to reach a presumption that inflammatory pretrial publicity so permeated the community as to render impossible the seating of an impartial jury, the court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial. See Sheppard, 384 U.S. at 342-45, 352-57, 86 S.Ct. 1507 (noting that "bedlam reigned at the courthouse during the trial" due to media's intrusive and pervasive presence in the courtroom, inflammatory news reports, often broadcast live from the courtroom, and media hounding of jurors and the defendant); Estes v. Texas, 381 U.S. 532, 577-80, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Warren, C.J., concurring) (media invasion of courtroom pierced the constitutional shield normally provided to the defendant by destroying "the dignity and integrity of the trial process"); Rideau v. Louisiana, 373 U.S. 723, 725-27, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) (repeated broadcast in defendant's small community of defendant's video taped "confession" to local authorities resulted in a "kangaroo court" that derailed due process and quashed any hope of fair trial in that locale); see also Stafford, 34 F.3d at 1566 (evaluating, on the issue of presumed prejudice, whether there was evidence of a "circus atmosphere or lynch mob mentality"); Abello-Silva, 948 F.2d at 1177 ("In cases like Estes, Rideau, and Sheppard, prejudice was presumed because the news media influence pervaded the proceedings, igniting extensive prejudice in the community.") (quotation omitted).

United States v. McVeigh, 153 F.3d 1166, 1181-1182 (10th Cir. 1998).

Irvin and its progeny are inapplicable to this case. The decisions of the United States Supreme Court applying this principle have based its holding not merely upon publicity, but upon the effect of that publicity upon the jury panel. In Irvin, for example, the Supreme Court noted the existence of a "pattern of deep and bitter prejudice," in the community against the defendant. Id., 366 U.S. at 727. Irvin and subsequent decisions "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." Murphy v. Florida, supra, 421 U.S. at 799; see also Dobbert v. Florida, 432 U.S. 282, 302-303 (1977). In this case, the mere existence of publicity is all that appellant has to offer--there exists not a scintilla of evidence from the trial record of a "huge . . . wave of public passion" directed at appellant. Irvin v. Dowd, supra, 366 U.S. at 728; Patton v. Yount, supra, 467 U.S. at 1033-1035;[4] State v. Johns, 34 S.W.3d 93, 108 (Mo.banc 2000), State v. McCullum,

[4]In Patton, the United States Supreme Court found that the pretrial publicity did not make a fair trial impossible in the county where the crime occurred, even though all but 2 of the 163 venirepersons had heard about the case and that 126, or 77%, admitted that they would carry an opinion into the jury box. This was because, although many people still carried strong opinions about the case, there was no longer

63 S.W.3d 242,253-255 (Mo.App.,S.D.2001).

The evidence that was presented did not show that there was extraordinary pretrial publicity right before appellant's trial or widespread public hostility towards appellant that created a circus atmosphere and created a presumption that venirepersons answers about being unbiased could not be trusted. On the contrary, it shows that some publicity occurred and that individuals who held fixed opinions about appellant's innocence or guilt readily volunteered that they were biased and were stuck from the panel. There was no huge wave of public passion and bitter prejudice against appellant in St. Louis County at the time of appellant's trial. It was just a case that was newsworthy.

The above analysis shows that there is no presumption of prejudice from the trial of the case in St. Louis County, see State v. McCullum, supra at 255, and appellant has failed to show that he suffered actual prejudice from the trial of his case in the St. Louis County Circuit Court. He cannot meet that burden by "speculation" in that he has the burden of proving prejudice "as a demonstrable reality." Beck v. Washington, 369 U.S.541,558 (1962). He does not attempt to meet this burden.

Appellant also argues that it was improper to try him in a courtroom in the St. Louis County Courthouse because this turned the jury into a biased mob in that the building itself was "a victim" that survived his crime and the "victim" should not have been present during the trial (App.Br. 54). But see Article 1, § 32, Missouri Constitution (as amended 1982)(constitutional right of crime victim to be present during a trial); United States v. Ramsey, 871 F.2d 1365,1367 (8th Cir. 1989)(magistrate was not required to recuse himself on the ground that the crime occurred in the federal courthouse where the trial was held

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a huge wave of public passion in that 4 years had passed since the time of the murder. Id. at 1032-1033.

and involved security guards stationed there).

However, the record does not show that appellant was prejudiced. The trial did not occur in the courtroom where the crime occurred. Most courtrooms resemble one another, and appellant does not suggest that the case should have been tried in a grocery store. Moreover, appellant failed to prove that any persons who sat on his jury would be biased against him based on the location of the trial. See State v. Hall, 982 S.W.2d 675, 682 (Mo.banc 1998). Thus, the trial court did not abuse its discretion when it denied appellant's motions for a change of venue.

III.

The trial court did not abuse its discretion when it denied appellant's motion to disqualify all St. Louis County Judges because blanket disqualifications of judges are improper without the agreement of all affected judges and appellant did not get the agreement of those judges.

Appellant argues that the trial court erred when it denied his motion to disqualify all of the St. Louis County Circuit Court judges (App.Br. 61; L.F. 72-76, 119).

However, the law is clear that "[b]ecause circumstances affecting whether recusal is necessary may vary for different judges within a circuit, a particular judge is, in the first instance, in the best position to determine whether recusal is necessary." State v. Smulls, 935 S.W.2d 9, 24 n.5 (Mo.banc 1996). "Disqualification and recusal are case-by-case determinations that cannot and should not be resolved with blanket order, at least not without the agreement of all affected judges." Smulls v. State, 10 S.W.3d at 497, 500 (Mo.banc 2000); State v. Nunley, 923 S.W.2d 911, 917 (Mo.banc 1996); State v. Taylor, 929 S.W.2d 209, 220 (Mo.banc 1996). Appellant failed to get the agreement of all of the affected judges. Thus, the trial court did not abuse its discretion when it denied appellant's motion and his third point on appeal must fail.

IV.

The presiding judge of the circuit court did not abuse his discretion denying appellant's motion to disqualify Judge Seigel because a reasonable person would not find a factual basis to doubt the impartiality of Judge Seigel based merely on his prior contact with and rulings in two cases pertaining to appellant.

Appellant alleges that the presiding judge of the circuit, the Honorable Robert Cohen, abused his discretion by finding that the trial judge, the Honorable Mark D. Seigel, was able to fairly decide the case and should not be disqualified because Judge Seigel had learned facts in two other cases that pertained to undisputed matters in the case at bar and made findings in those cases (App.Br. 68).

A. Procedural history

On April 2, 1998, this case was assigned to the Honorable Philip Sweeney (L.F. 1). Appellant filed a motion for a change of judge that was granted, and on April 24, 1998, the case was assigned to Judge Seigel (L.F. 1). Judge Seigel, was not a St. Louis County Circuit Court Judge or even present in the St. Louis County Courthouse at the time of the murder (Tr. 224). On May 20, 1998, appellant filed a "Legal Memorandum in Support of Defendant's Change of Venue and Change of Judge" (L.F. 89).

On August 3, 1998, Judge Seigel held a hearing on appellant's motion, but appellant did not present any testimony (Tr. 3-4). Appellant's counsel argued that there was no evidence that Judge Seigel was biased, but that the fact that he ruled in two other cases that pertained to appellant created an appearance of partiality (Tr. 6-7). Judge Seigel indicated that nothing in appellant's pleadings caused him to be uncomfortable about hearing this case (Tr. 10). He said that he did not have a close personal relationship with Judge Hais and whether or not Judge Hais was a witness in the case would have no effect

on him (Tr. 10-11).[5] He then denied appellant's motion (Tr. 11).

About 364 days later, on August 2, 1999, appellant presented a motion for a change of judge to the Presiding Judge of the circuit, Judge Cohen (L.F. 160,580). On December 10, 1999, Judge Cohen held an evidentiary hearing on appellant's motion (L.F. 203-204). He took judicial notice of the St. Louis County Circuit Court files from Bakker, et al. v. Baumruk, et al. v. McDonald Douglas, et al., No. G93286, which was a garnishment action in which Judge Seigel ruled in appellant's favor because of a federal law that prohibited the garnishment, and Nicolay v. Baumruk, No. 641138, which was a personal injury case that was tried on stipulated and undisputed facts (L.F. 209-210, 216, 225). Appellant did not present the testimony of any witnesses, including Judge Seigel, at the hearing. Judge Cohen then denied appellant's motion (L.F. 232).

Appellant filed motions for a writ of prohibition in the Court of Appeals and in this Court (L.F. 236,411). Those motions were denied on January 1, 2000, and February 17, 2000, respectively (L.F. 410, 628).

B. Rulings in other cases do not require disqualification

Appellant's claim that Judge Seigel's rulings in other cases show bias is, as will be explained below, based on a misstatement of the law. Such rulings, by themselves, do not show bias and do not provide a basis that requires recusal of a judge.

Missouri's standard for judicial disqualification is drawn from Missouri's Code of Judicial Conduct, Rule 2, Canons 2 and 3(C), "which provide that a judge should avoid the appearance of impropriety and

[5] Judge Hais was *not* a witness in the case.

shall perform judicial duties without bias or prejudice, and Rule 2, Canon 3(D), which provides that a judge should recuse in a proceeding in which the judge's partiality might reasonably be questioned." State v. Kinder, 942 S.W.2d 313,321(Mo.banc 1996). The test applied is whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court. State v. Jones, 979 S.W.2d 171,178 (Mo.banc 1998). "'A reasonable person... is not one who is ignorant of what has gone on in the courtroom before the judge. Rather, the reasonable person knows all that has been said and done in the presence of the judge.'" Smulls v. State, 10 S.W.3d 497, 499 (Mo.banc 2000)(citation omitted). Moreover, "[i]t is presumed that judges act with honesty and integrity." State v. Kinder, supra at 321.

Under this standard, "[a] disqualifying bias and prejudice is one with an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learning from participation in the case." State v. Nicklasson, 967 S.W.2d 596,605 (Mo.banc 1998); State v. Hunter, 840 S.W.2d 850, 866 (Mo.banc 1992); Smulls v. State, No. SC83179, slip op. at 5 (Mo.banc February 26, 2002).

A disqualifying "bias or prejudice must be personal, rather than judicial, and must be to such an extent so as to evince a fixed prejudgment and to preclude a fair weighing of the evidence." Williams v. Reed, 6 S.W.3d 916, 921 (Mo.App., W.D. 1999); State ex rel. Wesolich v. Goeke, 794 S.W.2d 692,697-698 (Mo.App., E.D. 1999).

A disqualifying bias can arise from a judicial source only if there is evidence of actual bias which is so extreme as to display a clear inability to render fair judgment. Haynes v. State, 937 S.W.2d 199, 203 (Mo.banc 1996)(trial judge was permitted to rule on Rule 29.15 motion even though at sentencing he had referred to the defendant as a monster and stated that he hoped that he died in prison in part because there

was no evidence of an "impossibility of a fair judgment").

The fact that a judge has ruled against a defendant in a related case is not a disqualifying basis. State v. Simmons, 955 S.W.2d 729, 744 (Mo.banc 1997)(trial judge allowed to preside over Rule 29.15 motion even though he made statements about the brutal and repulsive nature of the murder when he sentenced the defendant to death); State v. Christeson, 780 S.W.2d 119, 121-122 (Mo.App., E.D. 1989)(judge was not disqualified from case involving sex crimes even though he had heard evidence concerning the material facts of the case in a juvenile court action); Lamb v. State, 817 S.W.2d 642, 643 (Mo.App., S.D. 1991)(judge was not disqualified from hearing in a case in which the defendant kidnapped the defendant's ex-wife even though the judge had presided over the divorce case that was part of the motive for the kidnapping). Judges are presumed to be able to disregard matters that are not properly before them. State v. Roll, 942 S.W.2d 370, 378 (Mo.banc 1997).

Appellant alleges that the information that Judge Seigel received in other court proceedings disqualified Judge Seigel because it was "extrajudicial" information (App.Br 69). However, this argument is impaled by the definition of "extrajudicial." It is defined, in part, as "That which is done, given, or effected outside the course of regular judicial proceedings." Black's Law Dictionary, 526 (5th Ed.1979). What was done in the other cases was not extrajudicial.

Appellant does not allege that there is evidence of bias springing from a judicial source that is so extreme as to display a clear inability of Judge Siegel to render a fair judgment. See State v. Haynes, supra. It is presumed that Judge Siegel could disregard rulings made in other cases, State v. Roll, supra at 378, and appellant has failed to overcome this presumption by presenting evidence that would cause reasonable persons who were aware of this presumption to doubt Judge Siegel's impartiality and find that evidence of a clear inability to render fair judgment was present.

Appellant's reliance on State ex rel. McCulloch v. Drumm, 984 S.W.2d 555 (Mo.App., E.D. 1999), is misplaced. In that case, a circuit court judge, the Honorable Bernhardt C. Drumm, expressly stated that he had been biased against the State when he tried the case the first time because he had seen the defendant's psychiatric records and had decided before the trial that the defendant suffered from a mental disease or defect. Id. at 556. He said that this bias caused him to not allow the defendant to waive his right to a jury trial. Id. at 556. After a new trial was ordered and he was scheduled to retry the case without a jury, he said that he would not allow his former opinions on the issue of mental disease or defect affect his judgment in the upcoming jury-waived trial. The Court of Appeals found that this recantation of bias did not excuse Judge Drumm from being disqualified from the retrial because a disinterested bystander would have had factual grounds to doubt his partiality. Id. at 557. If Judge Drumm could not set aside his opinions during the first trial a reasonable person could infer that he would not be able to do that in the second trial. That case differs from the case at bar because of Judge Drumm's express statement that he had been biased against the State *during* the first trial. No such statement exists in the case at bar. If Judge Drumm had not made such a statement, nothing would have prohibited him from presiding over the retrial. Moreover, as will be discussed below, Drumm is distinguishable from the case at bar because the disputed issues involved in both trials in that case were the same there, but are different here. Thus, appellant's claims in his fourth point must fail.

C. Specific analysis of other cases

Should this Court choose to disregard the presumption that Judge Seigel was able to disregard what occurred in the other cases that involved appellant and matters that were not properly before him, See State v. Simmons, supra, and State v. Roll, supra, respondent will specifically address each case.

1. Bakker, et al. v. Baumruk, et al. v. McDonald Douglas, et al.

Bakker, et al. v. Baumruk, et al. v. McDonald Douglas, et al. was a garnishment action that was tried on stipulated facts by Judge Siegel (Supp.L.F.159, 178-184, 265-266).[6] The only issue in that case was whether the Circuit Court had authority to garnish appellant's savings and retirement plans that were in the custody of McDonell Douglas Corporation (Supp.L.F. 235-256). Judge Seigel ruled in appellant's favor. He found, on May, 24, 1995, that the Circuit Court was prohibited from ordering the garnishment by the Employee Retirement Income and Security Act (Supp.L.F. 266).

The case at bar did not involve the issue of whether the funds in question could be garnished. The mere fact that Judge Seigel "learned" through stipulated facts in that case that appellant intentionally killed his wife and shot others would not cause a reasonable person to doubt that he could be partial. As was discussed above, this does not pertain to bias from an extra-judicial source, it is presumed that he could disregard the facts that he "learned," and there is no evidence that his exposure to this information gave him bias that was so extreme as to cause him to be unable to render a fair judgment.

2. Nicolay v. Baumruk

[6] Judge Seigel was not the judge in the wrongful death case that resulted in the garnishment (Supp.L.F.375–377).

Nicolay v. Baumruk was a personal injury case that a bailiff brought against appellant for a gunshot wound to his right shoulder that involved no factual disputes about appellant's crimes (Supp.L.F. 390). The petition alleged, in part, that the shooting was intentional and involved intentional infliction of emotional distress because it was extreme and outrageous and reflected a reckless disregard to the rights of others (Supp.L.F. 393). It asked for actual and punitive damages (Supp.L.F. 393). At the hearing before Judge Seigel on November 1, 1996, appellant was represented by attorney John Doyen and attorney Martin Barnholtze, who was his defendant ad litem (Relator's Exhibit-D at 2).[7] The parties stipulated that appellant shot Nicolay on May 5, 1992, and the Court took judicial notice of State Farm Fire and Casualty Company v. Baumruk, No. 67810, which involved a jury verdict that appellant intentionally shot Nicolay and collaterally estopped appellant from denying that the shooting was intentional (Relator's Exhibit-D at 3-4). Nicolay briefly testified that appellant shot him and about the nature of his injuries, and medical records were admitted into evidence (Relator's Exhibit-D at 5-16). Appellant's counsel did not present any evidence to dispute the alleged facts–because none existed. After hearing the undisputed evidence, Judge Seigel rendered a judgment for Nicolay for $75,000 actual damages and $25,000 punitive damages based on the fact that the conduct was so outrageous, extremely intentional and reckless as to the rights of others (Relator's Exhibit-D at 21).

The only real issue in Nicolay was the amount of damages and this involved the sub-issue of whether appellant's actions constituted intentional infliction of emotional distress warranting punitive

[7]Respondent asks this Court to take judicial notice of this its files in State ex rel. Baumruk, No. SC82281, which pertain to the denial of appellant's motion for a writ of prohibition as to this claim and which contain this exhibit.

damages because it was extreme and outrageous and reflected a reckless disregard for the rights of others. This was not an issue in the case at bar. Here, appellant did not dispute that he shot Nicolay or the existence of the statutory aggravating circumstances. Moreover, while the depravity of mind statutory aggravating circumstance, which is cited by appellant, required a finding that appellant shot his wife as part of a plan to kill more than one person, the punitive damages did not require such a finding (App.Br. 69; L.F. 1020).

Nor would it matter if the cases involved the same issues even if those issues were disputed in the case at bar, because, as was discussed above, this would not cause a reasonable person to doubt that Judge Seigel could be impartial because it does not pertain to bias from an extra-judicial source, it is presumed that Judge Seigel could disregard what occurred in Nicolay, and there is no evidence that Judge Seigel's rulings in Nicolay gave him a bias that was so extreme as to cause him to be unable to render a fair judgment. The record shows that Judge Seigel was fair and impartial in ruling on appellant's case. See State v. Jones, supra at 178; Haynes v. State, supra at 205. Thus, appellant's fourth point must fail.

V.

The trial court did not commit plain error or error of any kind when it entered judgment and sentence against appellant because the State was not collaterally estopped or barred by statute from refiling charges that had been dismissed in that appellant waived his claims by not raising them below, this case did not involve the relitigation of the exact same ultimate fact or litigation of any ultimate fact that had been found by a jury in a final valid judgment, and the plain and unambiguous language of § 552.020,RSMo 1994, did not prohibit the refiling of the charges.

Appellant alleges that the trial court erred by "entering judgment and sentence" against him because the State was collaterally estopped from litigating the issue of his competency in that about seven years before appellant was sentenced Judge Belt found that he was incompetent to stand trial for the reasonably foreseeable future and dismissed the case (App.Br. 75). Appellant also claims that § 552.020.10(6), RSMo 1994, prohibited the refiling of criminal charges "until a higher court authorized it" because it does not address this subject (App.Br. 77-78).[8]

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[8] Appellant's argument contains numerous cites to hearsay in newspaper articles (App.Br.76-77). However, those articles , which are found in appellant's Change of Venue Exhibit A, were admitted into

evidence at a hearing in 1998 for the purpose of showing what articles the jury may have been exposed to, not for the truth of the matters asserted therein as appellant improperly attempts to use them on appeal (Tr.15).

A. Lack of preservation and waiver

Appellant's claims are not preserved for appeal because appellant did not raise these issues at sentencing and never filed a motion to quash the indictment based on this theories on appeal. See State v. Morrow, 968 S.W.2d 100,118 (Mo.banc 1998). Nor did he raise these theories in his motion for a new trial. Appellant's point relied on implicitly acknowledges this defect because he does not claim that the trial court erred by overruling any specific motion that he made.

This failure is fatal to appellant's claim because collateral estoppel is an affirmative defense that is waived if not raised at trial, Green v. City of St. Louis, 870 S.W.2d 794, 797 (Mo.banc 1994); Hagen v. Utah, 510 U.S. 399,409-410 (1994), and his claim concerning § 552.020, RSMo 1994, concerns a matter of the trial court's jurisdiction over appellant's person that was waived by appellant's failure to raise that claim below. See State v. Parkhurst, 845 S.W.2d 31, 35 (Mo.banc 1992). Thus, appellant's fifth point must fail.

B. Relevant facts

Should this Court choose to overlook appellant's waiver and review this claim for plain error, the record shows that on July, 21, 1993, appellant filed a motion for commitment to the Department of Mental Health on the ground that he was incompetent to be tried (L.F. 166). The Honorable Ronald Belt found that appellant was incompetent to stand trial and that there was no substantial probability that appellant would be fit to proceed in the reasonably foreseeable future (L.F. 173). However, he did not find that appellant would never be competent to stand trial.

Pursuant to Chapter 475, the Fulton State Hospital filed a "Petition for Appointment of Guardian and Conservator and Motion for Authorization to Admit Ward to a Mental Health Facility." State ex rel. Baumruk v. Belt, 964 S.W.2d 443, 444 (Mo.banc 1998). Appellant changed his tack and alleged that he

was competent. Id. The jury in those proceedings found that appellant "did not need a court-appointed guardian or conservator because the state did not prove by clear and convincing evidence that [appellant] was disabled, partially disabled, incapacitated, or partially incapacitated." Id. After Judge Belt refused to dismiss the criminal charges, appellant filed a motion for a writ of mandamus. Id. This Court ordered Judge Belt to dismiss the charges, but declined to decide whether the dismissal would be with or without prejudice. Id. at 477, n.3.

The charges were dismissed and then refiled 1998 (L.F. 17-23). Appellant was found to be competent to stand trial, and was convicted and sentenced without raising the claims in question (L.F. 754-762, 1046).

C. Analysis

1. Collateral estoppel

"As a general proposition, collateral estoppel, which is a species of double jeopardy, bars relitigation of a specific fact or issue that was unambiguously determined by a previous jury." State v. Simmons, 955 S.W.2d 752, 760 (Mo.banc 1997). It "'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" State v. Simmons, 955 S.W.2d 752, 760 (Mo.banc 1997)(quoting Ashe v. Swenson, 397 U.S. 436,445, (1970)).[9] This is inapplicable to this case because it and the prior case did not involve the same issues. The first case dealt with an issue of appellant's mental fitness in 1994 and question of whether he would be "mentally fit to proceed in the reasonably foreseeable future," §

[9]In criminal cases, unlike in civil cases, strict mutuality of the parties is required for collateral estoppel. State v. Lundy, 829 S.W.2d 54,56(Mo.App.,S.D.1992).

552.020, 10, RSMo 1994, while this case involved appellant's actual fitness to proceed at the time of his trial in 2001 (L.F. 173,754-762).[10]

Moreover, collateral estoppel is inapplicable because there is no final judgment on an ultimate issue as those terms are used in the double jeopardy context, because there is no jury finding of an acquittal as to any of the elements of the offense or an acquittal of the death penalty. Poland v. Arizona, 476 U.S.147 (1986)(a sentencer's decision that a particular a statutory aggravating circumstance was not supported by the evidence did not prevent the use of that circumstance in a later trial because it was not a finding on an ultimate fact in that it was not an "acquittal" of the death penalty or an acquittal of an offense). It was simply a decision as to an important matter that needed to be addressed before the case could be tried.

This has been illustrated in numerous cases holding that after an unfavorable pretrial ruling on an issue a prosecutor can properly get a case dismissed and then refile it without being subject to collateral estoppel. State v. Pippenger, 741 S.W.2d 710, 711 (Mo.App.,W.D.1987)(trial court suppressed evidence, case was dismissed and then refiled). This may occur as long as jeopardy had not attached in the

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[10] Appellant states that Judge Belt found that he "is permanently incompetent," although no such finding was made (App.Br.12). As was discussed above, Judge Belt found that appellant was incompetent to stand trial and that there was no substantial probability that appellant would be fit to proceed in the reasonably foreseeable future. (L.F. 173).

prior litigation, which did not occur in the case at bar. State v. Hughes, 899 S.W.2d 92, 95 (Mo.App.,S.D.1994)(trial court suppressed evidence, case was dismissed and then refiled); State v. Maggard, 906 S.W.2d 845,848 (Mo.App., S.D. 1995)(same). In a jury-tried case, jeopardy does not attach until the jury is sworn. State v. Stein, 876 S.W.2d 623, 625 (Mo.App., E.D. 1994). Contrary to appellant's assertion, whether the State has the opportunity to appeal a ruling is irrelevant to its ability to refile charges after dismissal (App.Br. 79). State v. Beezley, 752 S.W.2d 915, 917 (Mo.App., S.D. 1988).

2. Silence in § 552.020, RSMo 1994, does not prohibit refiling of charge

Appellant argues that Judge Belt's dismissal of this case should prohibit the refiling of a charge because of the failure of § 552.020.10(6),RSMo 1994, to address this issue (App.Br. 77). It states, in relevant part:

> If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges and the accused shall be discharged, unless....

This statute authorizes dismissal, without stating whether charges can be refiled in the future. Thus, under this clear language Judge Belt had power to order a dismissal and it would be up to other courts to later determine the legal effect of his order, as is occurring in the case at bar. Since this statute contains "no ambiguity" as to what Judge Belt was required to do, "[t]his Court cannot look to the rules of construction...." State ex rel. Baumruk v. Belt, supra at 446.

For example, Rule 24.02d.1(A), allows a prosecutor to dismiss charges as part of a plea bargain, but does not specify whether the charges later be can be refiled. Under this rule, the plea court simply has

power to dismiss charges. No assertion could seriously be made that this language in 24.02 means that a dismissal under that rule is necessarily with prejudice. After dismissal, a charge could be reinstated if it was not barred by double jeopardy.

Appellant does not dispute that this is the clear meaning of § 552.020.10(6) if one only looks at the words that it contains. However, he improperly attempts to resort to rules of construction and seeks to create an ambiguity by pointing to the 1997 amendment to this statute that made it even clearer that such a dismissal would be without prejudice (App.Br. 77). He argues that a dismissal under the 1994 statute must have been with prejudice because the legislature is presumed not to have done a useless act when it passed the 1997 law. However, putting express language into a statute to make sure that it is not misconstrued is not a useless act, but an act that reveals the legislature's long-standing resolve to make sure that persons who are incompetent to be tried but criminally responsible for their crimes can eventually be tried if their incompetency goes away or is later discovered to be a ruse.

What occurred in the 1997 modification, which expressly stated that a dismissal was without prejudice, was simply a codification of the existing law, which is that prior to the attachment of jeopardy a trial court has no inherent authority to dismiss a criminal case with prejudice. State v. Honeycutt, No. WD60010 (Mo.App., W.D. April 16, 2002). See Schleeper v. State, 982 S.W.2d 252 (Mo.banc 1998)(the passage of § 547.360, RSMo 1997, which contained language that was almost verbatim of Rule 29.15 did not provide a new remedy but simply codified Rule 29.15).

This resolve is also shown by the legislature's use of the language "no substantial probability that the accused will be mentally fit to proceed in the foreseeable future," instead of the language that a person is "permanently incompetent," as appellant wishes that it did (App.Br. 75). It would have been a useless act for the legislature to use this language if it did not intend for the issue of competency to be revisited in

the unforeseeable future if circumstances changed.

Appellant also alleges, for the first time on appeal and just in the argument portion of his brief, that simply recharging him instead of going through the lengthy appeal process violated due process by holding the murder charge over his head indefinitely (App.Br. 78). However, the record refutes this claim because it shows that the State pursued that charge, appellant was found to be competent and was convicted. Thus, appellant's fifth point must fail.

VI.

The trial court did not commit plain error during voir dire when it refused to allow appellant to inform the venirepersons that he shot people other than his wife, but that they were not killed, so that he could then ask them whether they would automatically impose the death penalty in light of this evidence because (A) appellant affirmatively waived this claim as to all jurors who were not already aware of these facts; and (B) the fact that appellant shot other people was not a critical fact in that it did not provide a proper basis for disqualifying venirepersons, but was part of an attempt to get an improper commitment from the jurors as to how they would decide the penalty phase based on the State's evidence.

Appellant alleges that "the trial court abused its discretion [during voir dire by] precluding [him] from asking [venirepersons] whether they would be predisposed to vote for the death penalty since [he] not only shot and killed his wife but 'he also shot others'" because the fact that he shot others carries a substantial potential for disqualifying bias (App.Br. 80).

A. Claim was waived as to relevant jurors

Appellant inexplicably neglects to mention that he affirmatively waived this claim as to all relevant jurors and did not try to inform the venirepersons of the facts in question until late in the voir dire, after all relevant jurors had already been questioned. The record shows that when voir dire began, appellant's counsel was concerned that the venirepersons had heard too many facts about the case, rather than too few, and he and the prosecutor ***agreed*** that the jury would only be told that "it's been alleged that on May 5, 1992, during a divorce hearing in this courthouse, defendant shot and killed his wife Mary Baumruk" (Tr. 993). The trial court specifically asked, "Do we have an agreement as to the language of the publicity

question Mr. Waldemer just put on the record" (Tr. 994). Appellant's counsel replied, "We have no objection to that language" (Tr. 994). The parties used that language, without objection, during the questioning of the first 4 panels (Tr. 1010, 1059, 108, 1145, 1200). After the venirepersons on the 5th panel who would serve on the jury had already been questioned and appellant's counsel had moved on (Tr.1206, 1208), appellant's counsel did an about-face and said that he wanted to ask the venirepersons about whether they would automatically vote for the death penalty if they also heard that appellant also shot others and no one else was killed (Tr. 1224-1225). The prosecutor objected on the ground that this question sought an improper commitment, and the trial court sustained the objection (Tr. 1224-1225).

After an overnight recess, appellant renewed his claim during the questioning of the 6th panel (Tr. 1251-1256). His request was denied and he was given a continuing objection (Tr. 1256). However, only two persons who served on the jury were in the 6th panel and none were in the remaining panels (Tr. 1257-1493; L.F. 970-983). Thus, appellant only asked to inform two of the jurors on the case about the matter in question, and those jurors already knew the facts of the case from the media. Juror Bean said that she saw news reports that said that appellant shot his wife and a couple other people, while Juror Belding said that he was familiar with the facts of the case because he watched the news regularly (Tr. 1264,1269). Both jurors could consider the full range of punishment (Tr. 1293). Thus, appellant's claim is without merit because he was not prevented from telling any jurors who had not heard about the facts in question. State v. Morrow, 968 S.W.2d 100, 111(Mo.banc 1998).

B. Claim is without merit

Even had appellant's claim been relevant to the persons who served on the jury who had not heard the facts of the case, the trial court did not commit plain error when it ruled because appellant sought to use the facts in question to improperly commit those jurors and those facts were not critical facts in that they

were not facts that provide a proper basis for disqualifying a venireperson.

To be entitled to relief under the plain error rule, an appellant must go beyond a mere showing of demonstrable prejudice to show manifest prejudice affecting his substantial rights. State v. Winfield, 5 S.W.3d 505, 516 (Mo.banc 1999). The appellant must show that the error affected his rights so substantially that a miscarriage of justice or manifest injustice will occur if the error is left uncorrected. Id.

"To be constitutionally compelled, it is not enough that ... questions might be helpful," because "the trial court's failure to allow questions must render the defendant's trial fundamentally unfair." Mu'min v. Virginia, 500 U.S. 415, 425-426 (1991). Critical facts, which are facts with a disqualifying basis, must be disclosed during voir dire so that the parties can probe for bias. State v. Clark,981 S.W.2d 143, 147 (Mo.banc 1998).

However, the question of how a juror would vote upon hearing the State's evidence is improper commitment that does not provide a basis for disqualifying a juror. This is because the relevant inquiry is whether a venireperson would automatically vote for a certain penalty "'regardless of the facts and circumstances of the individual case.'" State v. Ervin, 979 S.W.2d 149, 155 (Mo.banc 1998)(quoting Gray v. Mississippi, 481 U.S. 648,657 (1987)); State v. Kreutzer, 928 S.W.2d 854, 866 (Mo.banc 1996). It is not whether they would always impose the death penalty under the facts and circumstances of a specific case. While the facts in question might have "posse[d] substantial obstacles to the defense," they were not critical facts because their disclosure would not have provided a disqualifying basis for the venirepersons. State v. Oates, 12 S.W.3d 307, 312 (Mo.banc 2000)(defense properly prevented from asking if the venirepersons believed that the fact that a person is shot in the back of the head automatically defeats a claim of self-defense).

The case at bar is analogous to United States v. McVeigh, 153 F.3d 1166 (10thCir.1998). In that

prosecution for 11 counts from the bombing of the Alfred P. Murrah Federal Building in Oklahoma, which resulted in the killing of 168 people, the defense was properly prohibited from asking general and specific questions about how the venirepersons would vote after hearing the evidence.

The general question that was rejected pertained to whether the venirepersons would automatically vote for the death penalty after they heard the evidence about the crimes from the guilt phase. Id. at 1206. The United States Court of Appeals stated:

> the question is susceptible of an interpretation asking the juror how she would vote on the evidence presented at trial. That is a question broader than the scope of inquiry Morgan requires. The question approved in Morgan [v. Illinois, 504 U.S. 719 (1992)] was the following: "If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" Morgan, 504 U.S. at 723 (emphasis added). The Supreme Court felt such a question was necessary to identify jurors who would always impose the death penalty upon conviction of a capital offense "regardless of the facts and circumstances of conviction." Id. at 735. Here, by contrast, the question was predicated on the assumption that the juror had heard the evidence and was asked, given that evidence and a finding of guilt, how she would vote on the question of penalty. Since the juror had not yet heard the evidence, the question improperly called for speculation and sought a precommitment from the juror.

United States v. McVeigh, supra at 1207.

As to questions about whether jurors would automatically vote for the death penalty in light of specific evidence, it stated:

> Morgan does not require courts to allow questions regarding the evidence expected to be

> presented during the guilt phase of the trial. Further, we have held that Morgan does not require a court to allow questions regarding how a juror would vote during the penalty phase if presented with specific mitigating factors. See Sellers, 135 F.3d at 1341-42; McCullah, 76 F.3d at 1114. Other courts have issued similar rulings, holding that Morgan does not require questioning about specific mitigating or aggravating factors. See United States v. Tipton, 90 F.3d 861, 879 (4th Cir.1996)...; People v. Jackson,...695 N.E.2d 391, 407...(Ill.1998); Evans v. State,...637 A.2d 117,124-25 (Md.1994); Holland v. State, 705 So. 2d 307, 338-39 (Miss.1997)...; Witter v. State,...921 P.2d 886, 891-92 (Nev.1996)...; State v. Fletcher,...500 S.E.2d 668,679 (N.C. 1998); State v. Wilson,...659 N.E.2d 292,300-301(Ohio)...; State v. Hill,...501 S.E.2d 122, 127(S.C.1998). In fact, some of these courts have held that such questions not only are not required by Morgan, but are also simply improper. See Evans, 637 A.2d at 125(explaining why 'stake-out' questions are impermissible); Witter, 921 P.2d at 89(same); Fletcher, 500 S.E.2d at 679(same).

United States v. McVeigh, supra at 1208.

State v. Clark, supra, which is relied on by appellant, is distinguishable from the case at bar. In Clark, the defendant was preluded from finding out if the jurors could be fair and impartial jurors if they knew that one of the victims was a three-year old. Id.

> There exists a prevalent perception among society that the killing of an innocent child is never justified, regardless of the circumstances. It is by virtue of this common perception that the circumstances of the murder in Clark constitutes a critical fact that necessitates allowing the defense to probe the venire panel during voir dire.

State v. Oates, supra at 311.

In the case at bar, on the other hand, the facts in question were not offered for the purpose of finding out whether the venirepersons would be biased in the guilt phase determination, as in Clark, but were instead offered for the improper purpose of getting the jurors to commit to what punishment they would impose if they heard about State's evidence that warranted the imposition of the death penalty. Moreover, there is no prevalent perception in society that the shooting of more than one person is never justified and appellant never alleged that he did not do the shooting or that the shooting was justified.

In light of the above, respondent submits that the trial court did not commit plain error resulting in manifest injustice and that appellant's sixth point must fail.[11]

[11] Appellant asks for a new trial (App.Br.86). However, the alleged error only pertains the penalty phase.

VII.

The trial court did not err when it found that appellant was competent to stand trial because a reasonable judge could have inferred from the evidence that appellant had a sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and had a rational as well as factual understanding of the proceedings against him and collateral estoppel did not bar the litigation of this issue.

Appellant alleges that the trial court erred in finding that he was competent to be tried because the State's witnesses on this matter were allegedly not as credible as the defense witnesses that he paid to testify (App.Br. 87). His claim is based on fundamental misunderstandings of the law concerning competency, which will be discussed below.

A. Relevant facts

Viewed in the light most favorable to the trial court's finding, the following evidence was adduced: The State called Dr. John Rabun, who was a psychiatrist at St. Louis State Hospital (Tr. 243). He evaluated appellant and issued reports in 1999 and 2000 that showed that appellant was competent (Tr. 251-252,288,399-400). Appellant was aware that the key issue in his case was his competency and what could happen to him if he was found to be competent (Tr. 283). During the interviews, appellant was logical, rational, attentive, goal-directed, and stayed on point (Tr. 264-265). Appellant read the Post Dispatch daily and displayed a readily apparent knowledge of current events and an ability to learn new information (Tr. 265,276). He had a full-scale IQ of 85 and was capable of abstract reasoning (Tr. 268-271). Appellant understood about various matters concerning trials and the punishment that he was facing (Tr. 282-286).

In the first interview, he told Rabun that he recalled buying the pistols, putting them in his briefcase

that was checked as luggage that was transported in the baggage compartment of the airplane, what happened on the plane as he flew to St. Louis for court proceedings, and that his last memory prior to the shootings was a memory of him reaching down to the briefcase (Tr. 262). He said that his next memory was of waking up in the hospital (Tr. 262). However, in his second interview he changed his story by saying that he did not know if he put the revolvers in the briefcase or how they got to St. Louis (Tr. 339). He also claimed that he did not remember turning off his utilities before he came to St. Louis (Tr. 342).

Appellant's selective memory, the remembering of neutral facts and the alleged failure to remember incriminating facts, suggested that he might be faking amnesia (Tr. 282,337-340). Unlike the defense witnesses, Rabun went out and spoke to numerous witnesses and fully investigated this matter. This investigation revealed that on May 5, 1992, appellant told a doctor, "I shot that bitch because of a divorce" (Tr. 323). On November 2, 1992, appellant told a social worker at the County Justice Center, Larry Buck, exactly how and why he did the charged crimes (Tr. 315-319, 759). Between March and July of 1998, appellant told a fellow inmate facts demonstrating that he had full knowledge of what had occurred (Tr.295-303). Appellant also told that inmate that he did have amnesia, but that it was only for the period of time *after* he was shot (Tr. 303). In October of 1998, appellant told Stewart Glenn, a Clayton Police Officer, that he was not sorry that his wife was dead because he shot her when she crunched her lips (Tr.354, 825). Appellant also told Rabun that his family had a history of mental illness and suicides, even though this was not true (Tr. 312-314, 326-328).

Dr. Rabun determined that appellant's memories were intact (Tr. 282). He said that from 1995 on appellant did not have dementia (Tr. 441). Appellant understands the purpose of the proceedings and has the ability to assist in his defense (Tr. 399). He does not need hospitalization and does not require a

guardian to oversee his affairs (Tr. 400).

Dr. Richard Scott, a psychologist at the St. Louis Psychiatric Rehabilitation Center, testified about his detailed questioning of appellant that revealed that appellant knew about the various aspects of trials (Tr. 681-706). He gave appellant the TOMM test, which is a test of malingering memory, and it showed that appellant had excellent memory (Tr. 710-712). Appellant took the test three times and scored a perfect 50 out of 50 each time (Tr. 712). He said that appellant understood the legal proceedings and had the ability to work effectively with his counsel (Tr. 722).

Other witnesses testified about appellant's ability to care for himself and his mental abilities (Tr. 607, 629-634, 667-670), his improved physical condition (Tr.610,620-621), litigation and grievances that appellant filed (Tr. 622, 799-820), statements showing appellant's memory of the shootings (Tr. 642, 762-763), and a statement showing that appellant knew that he could not be prosecuted if he was incompetent (Tr. 666).

Appellant presented the testimony of Dr. Bruce Harry, who stated that he had not examined appellant since August 15, 1994, and could not testify about appellant's current condition since appellant had improved since he had seen him (Tr. 913; Hammack-Tr.159-160). He said that he had determined in 1994 that appellant had dementia that caused amnesia, but admitted that appellant did not have dementia as that term was defined in DSM-IV and that appellant did not meet the standards for civil commitment (Tr. 957-958, 964-965). He had also testified in 1994 that appellant would not get any better, but now testified that he had been wrong (Tr. 912-915). From 1993-1998, appellant was "much improved" and had gotten "dramatically better" (Hammack-Tr. 138, 152, 160). He recognized that appellant did not have a history of mental illness before the murder and that appellant had a motive to lie to him about his memory because he knew that he could go free if he was successful (Tr. 919-922). He also recognized that no test could

determine whether appellant suffered from amnesia (Tr. 926,928).

Defense witness Dr. Sam Pawatikar, who had not examined appellant since 1993, testified that appellant suffered from dementia because he had a memory deficit, but that he did not know if appellant's mental condition had improved since 1993 and he had seen appellant improve during the time that he examined him (Lunatto-Tr. 22,30). He recognized that there was no test for amnesia and that appellant said that he knew that he could not be prosecuted if he had amnesia (Lunatto-Tr. 33-34).

Defense witness Dr. Daniel Cuneo testified that he believed that appellant was incompetent because of appellant's alleged amnesia, but was confused by appellant's alleged inability to remember some incriminating facts that pertained to matters long before the alleged amnesia started – such as why appellant put the pistols in his brief case and appellant's alleged inability to remember repeatedly telling his co-workers that he was going to shoot his wife, lawyers and judge (Lunatto-Tr. 69, 181). He recognized that not all persons with severe brain injuries suffer from amnesia (Lunatto-Tr. 187). Cuneo said that appellant's condition had dramatically improved between 1993 and 1999 (Tr. 2170). He was aware that appellant had filed at least two federal lawsuits on his own (Tr. 2181). He said that he did not go and talk to the witnesses who had been interviewed by Dr. Rabun and who had information that showed that appellant did not have amnesia as to the time of the murder (Lunatto-Tr. 145-158). He said that appellant would be competent to stand trial today if he committed a new offense and that he does not need hospitalization (Lunatto-Tr. 188).

The trial court found that Dr. Rabun was credible and that appellant was competent (L.F. 754-762). It found that his claim of amnesia was "dubious at best" and was not a proper basis for a finding of incompetence (L.F. 762). It found that there was no credible evidence of a mental disease or defect to support a finding that appellant was unable to assist and consult with his lawyer or that prevents him from

having a rational as well as factual understanding of the proceedings against him (L.F. 762).

B. Analysis

Appellant argues that he is incompetent because his experts found that he cannot remember the murder. However, even if the trial court was required to believe appellant's experts, which it was not, this evidence would not prove that appellant was incompetent.

"A defendant is competent when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." State v. Johns, 34 S.W.3d 93, 104 (Mo.banc 2000)(internal quotation marks and citations omitted); § 552.020.1, RSMo 2000. This standard pertains to the ability to consult and understand, it has nothing to do with ability to remember the offense. Amnesia is no bar to the prosecution of an otherwise competent defendant. State v. Garrett, 595 S.W.2d 422, 433-434 (Mo.App., S.D. 1980); State v. Davis, 653 S.W.2d 167, 173-174 (Mo.banc 1983); Bryant v. State, 563 S.W.2d 37 (Mo.banc 1978); Leach v. Kolb, 911 F.2d 1249, 1260 (7th Cir.1990); Davis v. Wyrick, 766 F.2d 1197, 1202 (8th Cir.1985); Holmes v. King, 709 F.2d 965, 968 (5th Cir. 1983).

Appellant's reliance on State ex rel. Sisco v. Buford, 559 S.W.2d 747 (Mo.banc 1978), is misplaced. As this Court explained in State v. Davis, supra, Sisco did not deal merely with brain damage that caused amnesia, but damage that also disturbed the defendant's ability to have initiative, to correctly evaluate behavior and take actions, to plan ahead, to deal with information in a coherent manner, to make decisions, place events in proper sequence, or make analysis or deductions.

Moreover, even if amnesia was a bar to prosecution, it would not have barred this case because there was substantial evidence, discussed above, from Dr. Rabun, Dr. Scott, and the other State's witnesses, that appellant did not have amnesia and that he was competent to stand trial. The cross-

examination of the defense witnesses showed that they were not current on appellant's much-improved condition, that they had not fully investigated his alleged amnesia, and that they were not credible.

Appellant's argument that the trial court was required to believe his witnesses is not supported by the law. At the hearing on this issue, the defendant is presumed to be competent and has the burden of proving his incompetency by a preponderance of the evidence. § 552.020.8, RSMo 2000.

Appellant does not dispute that there was substantial evidence to support the trial court's finding that he was competent. Instead, he argues that this Court should reweigh the evidence that was presented and make new credibility determinations. However, that is not the appropriate standard of review.

> [T]he trial judge's determination of competency is one of fact and must stand unless there is no substantial evidence to support it. . . . In testing sufficiency of the trial court's determination of the defendant's competency, "the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding."

State v. Petty, 856 S.W.2d 351, 353 (Mo.App., S.D. 1993)(citation omitted); see also State v. Hampton, 959 S.W.2d 444, 449 (Mo. banc 1997). "[I]t is the duty of the trial court to determine which evidence is more credible and persuasive." State v. Johns, supra at 105.

Appellant also states, with no real argument that the State was barred from litigating the issue of his competency by the doctrine of collateral estoppel (App.Br. 87). However, this issue was disposed of in Point VI of this brief and is without merit here for the same reasons as there. Thus, appellant's Point VII must fail.

VIII.

The trial court did not abuse its discretion during voir dire when it denied appellant's challenge for cause as to juror Belding because Belding repeatedly and unequivocally stated that he could hold the State to its burden of proof and decide the case based on the evidence in court, rather than publicity that indicated that appellant killed his wife. Further, appellant could not have been prejudiced even if Belding was biased on that matter because the fact that appellant killed his wife was undisputed.

Appellant alleges that the trial court abused it discretion when it denied his challenge for cause of juror Richard Belding because he said that the publicity surrounding the shooting left him with no question that appellant did the shooting and he recognized that it was theoretically possible that any human, including himself, could be influenced by this information (App.Br. 100). Appellant neglects to mention that Belding repeatedly and unequivocally stated that he could set aside his opinion and require the State to carry its burden of proof in the courtroom.

The record shows that Belding was informed that the instructions would require that the case be decided on the evidence presented in court, rather than what was heard from the media (Tr.1265). Under questioning from the prosecutor, Belding stated that he had heard about the case in the media and formed an opinion that appellant did the shooting (Tr.1269-1270). He also said that he thought that he heard that appellant was shot by a guard or something, but that he was not sure (Tr. 1269).

He then repeatedly and unequivocally stated that he could decide the case solely on the evidence that was adduced. The following occurred:

> MR. WALDEMER: ...If you listen to the evidence in this case and the evidence was different that what you read in the newspaper, would you be able to set aside what you

read in the newspaper, saw on the news, and decide this case?

VENIREPERSON BELDING: Yes.

MR. WALDEMER: Wouldn't interfere - - what you've seen on the news wouldn't interfere with your deliberations?

VENIREMAN BELDING: I would say no.

(Tr. 1270-1271).

Appellant's counsel then questioned Belding about how the possibility that any human could end up considering facts that they believed that they would not consider and got Belding to speculate that it was hypothetically possible that he would consider the facts he heard in the media. The following occurred:

> MR. GREEN: When you say you would say no, does that mean that there's a possibility that it would be difficult for you to separate the two and you may weigh the credibility or judge the evidence that you hear in t he courtroom as to how it compares to what you heard in the news?
>
> VENIREMAN BELDING: You know, until facts came out, I don't know what I'm actually going to think.
>
> MR. GREEN: Right.
>
> VENIREMAN BELDING: You know, I would do my best. I understand the rules and I'll do my best to do that. You know, we are human so you are influenced by, you know, little things that you have up there anyway so.
>
> * * *
>
> MR. GREEN: So what we are – want to know, because of what

you heard about it and how much you heard about, it is: Are you going to be, in deciding the facts in this case and weighing the evidence in this case, is there a danger that you could be influenced by what you heard in the media as opposed to the jurors that didn't hear anything in the media?

VENIREMAN BELDING: I think there would be a danger, but I would do my best.

MR. GREEN: That's all we can ask but –

VENIREMAN BELDING: To listen to the facts and not be influenced by –

MR. GREEN: There is a danger that you could be influenced by it because you're human?

VENIREMAN BELDING: Yes.

MR. GREEN: When you first heard about this stuff in the media, did you form any opinion as to what the appropriate punishment should be for somebody who does those types of acts?

VENIREMAN BELDING: I don't think so.

(Tr. 1271-1273).

The trial court then further questioned Belding and made sure that he understood that the State had the burden of proof and that he would acquit appellant if the State failed to meet its burden. The following occurred:

THE COURT: Mr. Belding, you understand that the State has the burden of proof in this case?

VENIREMAN BELDING: Yes.

THE COURT: They have to prove their case beyond a reasonable doubt. You understand that?

VENIREMAN BELDING: (indicating.)

THE COURT: And if the State would fail to prove their case beyond a reasonable doubt, that is they didn't meet their burden, you understand that I've instructed you already that you must give the benefit of the doubt –

VENIREMAN BELDING: I understand that.

THE COURT: You would then be required to find him not guilty. Is that a yes?

VENIREMAN BELDING: Yes.

THE COURT: Could you do that?

VENIREMAN BELDING: Yes.

THE COURT: If the State did not meet its burden in this case, and you felt the State didn't meet its burden of proof, you could find the defendant in this case not guilty?

VENIREMAN BELDING: Yes. Yes, I think so.

THE COURT: Is there any hesitation at all?

VENIREMAN BELDING: You know, I would have to hear what the facts are.

THE COURT: I understand that.

VENIREMAN BELDING: I'd say yes I can.

THE COURT: I'm asking you to assume the State did not meet its burden.

VENIREMAN BELDING: I'll say, yes.

(Tr. 1273-1275).

Appellant's motion to strike Belding was overruled, and Belding served as a juror (Tr. 1290-1291; L.F. 983).

The trial court has sound discretion over voir dire and its findings of juror impartiality may "'be overturned only for manifest injustice'" State v. Nicklasson, 967 S.W.2d 596, 612 (Mo.banc 1998)(quoting Mu'Min v. Virginia, 500 U.S. 415, 428 (1991). Appellant has the burden of showing a "real probability" that he was prejudiced. Id. "The trial court is in the best position to examine a venireperson's demeanor in making a determination of whether a venireperson should be removed from the venire because of bias, prejudice, or impartiality." State v. Barton, 998 S.W.2d 19, 25 (1999). The qualifications of a prospective juror are not conclusively determined by a single response, but on the entire record. State v. Clayton, 995 S.W.2d 468, 475 (Mo.banc 1999).

In the case at bar, it does not "clearly appear" from the record that Belding was biased. See State v. McRoberts, 837 S.W.2d 15, 18 (Mo.App., E.D.1992). Belding repeatedly and unequivocally stated that he could set aside the facts he heard in the media and decide the case on the evidence that was presented. See State v. Clouse, 964 S.W.2d 860, 864 (Mo.App., W.D. 1988).

Appellant attempts to ignore these statements and focuses on Belding's admission that he cannot give an absolute guarantee that the facts in the media would not intrude on his thinking because no human being could be absolutely certain that this would not occur. However, these statements recognizing the

difficulty of the task that was ahead of juror Belding and speculation about potential dangers and the possibility of prejudice do not constitute evidence that he believed that he could not fairly decide the case based on the evidence and hold the State to its burden of proof and was not clear evidence that he was actually biased. See State v. Ward, 782 S.W.2d 725, 730 (Mo.App., E.D. 1989)(challenge for cause properly denied even though venireperson made statements about how hard it would be for a crime victim such as her to decide the case based on the evidence in court). They did not undermine his prior statements about his ability to be unbiased.

Moreover, after appellant elicited these statements, the trial court conducted follow-up questioning that made sure that Belding would hold the State to its burden of proving its case in court. Thus, the trial court acted well within its broad discretion in considering the record in its totality and finding that Belding was not biased because of the statements in the media that indicated that appellant killed his wife.

Additionally, appellant could not have been prejudiced even if Belding was biased by the media into believing that appellant killed his wife because this matter was not in dispute in that appellant conceded that he murdered his wife (Tr. 2008-2017). See State v. Edmonson, 827 S.W.2d 243, 248 (Mo.App., S.D. 1992)(no prejudice from error in denying challenge for cause as to venireperson who was biased in favor of the testimony of police officers where the testimony of those officers did not provide the elements of the offense, more important testimony came from other witnesses, or where the officers did not testify on any truly contested issues); State v. Draper, 675 S.W.2d 863, 865 (Mo.banc 1984). Further, as to the penalty phase, Belding specifically stated that he had not formed any opinions as to the appropriate punishment based on what he had heard in the media (Tr. 1273). Thus, appellant's eighth point must fail.

IX.

The appellant's claim that the trial court committed plain error by failing to grant a mistrial on its own motion at numerous points during the State's closing argument should be denied without explication because granting a mistrial that was not requested by appellant would have interfered with appellant's right to have the case completed by the jury that was sworn to hear the case and appellant did not waive that right, appellant's failure to object is presumed to be a matter of trial strategy, and appellant has failed to justify why plain error review should be conducted in this case.

Moreover, appellant's claims of plain error are without merit because the prosecutor's arguments were proper, appellant failed to show that the alleged errors could not have been cured by means other than a mistrial or that the alleged errors had a decisive effect on the outcome of the trial.

Appellant alleges that the trial court committed plain error by not declaring a mistrial on its own motion at numerous times during the State's closing arguments (App.Br. 103).

A. Uninvited intervention is dangerous and was unwarranted

Appellant appears to concede that none of his claims are preserved for appeal because he did not object to the arguments at trial. His failure to raise the claims below is fatal to them because a trial court should avoid granting a mistrial on its own motion in that a defendant has the right to have his trial completed by the jury that was sworn to hear his case and a retrial would be barred by the Double Jeopardy Clause if any prejudice could have been cured by less drastic remedy. State v. Marlow, 888 S.W.2d 417, 420 (Mo.App., W.D. 1994); State v. Weeks, 982 S.W.2d 825, 838 n. 13 (Mo.App., S.D. 1998).

Moreover, this Court has stated that it will not review the claims not preserved for appeal, and

relief should be rarely granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication. State v. Clay, 975 S.W.2d 121, 134 (Mo.banc 1998). The failure to object during closing argument is more likely a function of trial strategy than of error. State v. Boyd, 844 S.W.2d 524, 529 (Mo.App., E.D. 1992). See also State v. Tokar, 918 S.W.2d 753, 768 (Mo. banc 1996).

In the absence of an objection, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. State v. Clemmons, 753 S.W.2d 901, 907-908 (Mo.banc 1988). Had objection been made, the trial court could have taken appropriate steps to make corrections. State v. Kempker, 824 S.W.2d 909, 911 (Mo.banc 1992). A party cannot fail to request relief, gamble on the verdict, and then if adverse, request relief for the first time on appeal. State v. McGee, 848 S.W.2d 512, 514 (Mo.App., E.D. 1993).

B. Plain error review

Should this Court decide to conduct plain error review, a conviction will be reversed only where it is established by the appellant that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. State v. Clayton, 995 S.W.2d 468, 479 (Mo.banc 1999).

1. No Argument about excluded evidence

In the State's guilt-phase rebuttal argument, the prosecutor said:

> I assume what he's trying to tell you, is this man over a year and a half got so angry that he was out of control. But you heard no evidence of that. Instead you heard evidence from eyewitnesses.

* * *

He says his life is out of control, yet there is no evidence of that. He went to work every day. Mr. Pittson, his lead at Boeing, said that he did a very good job. Is that a person that's overcome? There is no evidence of that. There is no evidence of mental illness.

* * *

It doesn't mean that he doesn't cooly reflect, because if there that kind of evidence you would have heard it. There was none of that. You heard witnesses who said that he did this cooly, calmly, deliberately.

(Tr. 2018, 2021).

Appellant claims that the prosecutor's argument was improperly commenting on evidence that was excluded because appellant had been prohibited from presenting Defense Exhibits A and B, which were pleadings allegedly signed and filed by appellant about a year and a half before the murder in his divorce case about the division of property and that were full of hearsay and that had no tendency to show that appellant did not deliberate though they tended to show appellant's motive for the murder (App.Br. 105). However, the prosecutor was not asking the jury to draw an adverse inference from appellant's failure to present that specific evidence, which did *not* show that appellant did not deliberate, but was instead pointing out that there was no evidence from any source, including the psychiatric testimony, showing that appellant did not deliberate. See State v. Langston, 889 S.W.2d 93, 97 (Mo.App., E.D. 1994) (proper for the State to argue that there was no evidence that the defendant was beaten by the police even though medical records containing hearsay about that were excluded - -that evidence could have come from other sources); Toler v. State, 823 S.W.2d 140, 142 (Mo.App., E.D. 1992)(prosecutor properly argued that defendant's testimony was uncorroborated after certain hearsay was excluded because the defendant had

not used any source to corroborate his testimony).[12] Moreover, the proposition that the defendant did not deliberate "was not clearly supported by [appellant's] own offer of proof," State v. Black, 50 S.W.3d 778, 787 (Mo.banc 2001), because there is nothing in those divorce pleadings that shows that appellant did not deliberate.

Additionally, appellant has not shown that the alleged error could not have been cured by measures short of a mistrial, such as by an objection and an instruction to disregard. State v. Nolen, 872 S.W.2d 660, 662 (Mo.App., S.D. 1994). Nor has he shown that the argument had a decisive effect on the result of the case in light of the overwhelming evidence of deliberation in the case at bar.

2. Argument about seriousness of appellant's conduct

Appellant alleges that the trial court committed plain error by not declaring a mistrial on its own motion during the penalty-phase argument when the prosecutor argued that there were no metal detectors in the courthouse in 1992, that appellant attempted a mass murder in the courthouse against members of your community, and that the defendant should face the ultimate punishment because that was what was just (App.Br.107-108; Tr.2003, 2023, 2235,2238-2239, 2243, 2257). Appellant argues that this was improper because it made the community, which included the jury, appear to be a victim of appellant's

[12]If appellant's argument is carried to its logical conclusion, the State would be permitted to prohibit appellant from arguing that it had not proven that he deliberated simply by unsuccessfully attempting to admit clearly inadmissible evidence of deliberation.

attack (App.Br. 107).

However, these were proper arguments that focused on the seriousness of appellant's actions and why his actions warranted the death penalty. Appellant overlooks the fact that arguments asking for the jury to act in defense of society are appropriate. Simmons v. South Carolina, 512 U.S. 154,157-163 (1994); State v. Kreutzer, 928 S.W.2d 854, 877 (Mo.banc 1996). A prosecutor may argue about the personal safety of members of the community, the need to convict and punish the defendant to prevent crime, the need for strict law enforcement, and the effect of the jury's failure to do its duty to enforce the law, as long as the prosecutor stays within the record, inferences from the record or matters of common experience and does not raise an inflammatory appeal to the jurors that arouses their personal hostility to the defendant, such as by implanting in their minds the fear that the defendant's acquittal will endanger their own personal safety or that of one of their family members. State v. Plummer, 860 S.W.2d 340, 350 (Mo.App., E.D. 1993).

The arguments in question did not suggest that the safety of the jurors or their family would be in danger if they sentenced appellant to life in prison without eligibility for parole instead of death, which are the only two sentences that were available. State v. Kreutzer, supra at 873. They simply pointed out the seriousness of appellant's actions, which had occurred nearly a decade earlier, and asked for the jury to impose the appropriate punishment.

Additionally, appellant has not shown that the alleged errors could not have been cured by measures short of a mistrial, such as by an objection and an instruction to disregard. Nor has he shown that the argument had a decisive effect on the result of the trial.

3. Argument about the victims still being emotional

Appellant alleges that the trial court committed plain error by not declaring a mistrial on its own

motion during the State's arguments in both phases of the trial when the prosecutor spoke of the emotions that the jurors could see that the witnesses still possessed about what appellant did and that the witnesses remembered what occurred like it happened yesterday (App.Br. 110; Tr. 1998, 2001, 2006-2007, 2239, 2240). The prosecutor also argued, "Don't feel sympathy for appellant because nine years have passed. Do what is right" (Tr.2244). Appellant alleges that these arguments were improper because they asked the jurors to "decide [his] fate based on the case's raw emotions" (App.Br. 103).

However, this is nothing like State v. Taylor, 944 S.W.2d 925, 937 (Mo.banc 1997), a case cited by appellant which dealt with a claim that was preserved for appeal where a prosecutor improperly told a jury, "Now is the time you can put your emotion into it. Now is the time that you can show your outrage. Now it is time to get mad. You can get mad at this man." There, a prosecutor asked the jury to decide the case based on emotion, while the prosecutor in this case made no such plea. Here, the prosecutor asked the jury to believe that the witnesses recollections based on how fresh it appeared that their memories were due to the emotion that they displayed in court as they were discussing what they had seen.

Additionally, appellant has not shown that the alleged errors could not have been cured by measures short of a mistrial, such as by an objection and an instruction to disregard. Nor has he shown that the argument had a decisive effect on the result of the trial.

4. Send a message argument

Appellant alleges that the trial court committed plain error in the penalty phase by failing to declare a mistrial on its own motion when the prosecutor argued that the jurors would send a message with their verdict (App.Br. 111). The prosecutor argued as follows:

> You will send a message with your verdict, whatever it is. It will go out through the community when you go back to your friends, your family, your co-workers, your

> neighbors. And as citizens of the county you have to tell him that for what he did for the rest of his life, for however long that is, who knows, but he dies in the execution chamber for his crimes or whether God come to get him, he should know from you, the citizens of this community, that for what he did in this courthouse, that you think he should face the ultimate punishment, because each of you know in your heart that's what's right, that's what's just.

(Tr. 2257).

This argument, which was also part of the argument addressed in subsection 2 above, is a proper argument about the fact that a jury's verdict will send a message to the community. State v. Cobb, 875 S.W.2d 533, 537 (Mo.banc 1994); State v. Smith, 944 S.W.2d 901, 919 (Mo.banc 1997). Appellant argues that this was not a send-a-message argument, but was simply "[p]laying on jurors' fears" (App.Br. 111). However, appellant's argument is not supported by the record.

Additionally, appellant has not shown that the alleged errors could not have been cured by measures short of a mistrial, such as by an objection and an instruction to disregard. Nor has he shown that the argument had a decisive effect on the result of the trial.

5. Argument that appellant had no remorse and did not care

Appellant alleges that the trial court committed plain error by failing to declare a mistrial on its own motion when the prosecutor argued in the State's penalty-phase argument that appellant did not care about his acts and had no remorse (App.Br. 112; Tr. 2240-2241, 2258).

Appellant claims that these statements improperly argued appellant's failure to testify. However, they were not direct comments on appellant's failure to testify or indirect comments that was calculated to draw the jury's attention to appellant's to testify. See State v. Clemons, 946 S.W.2d 206, 228 (Mo.banc

1997). Instead, they were drawn from Dr. Cuneo's testimony that appellant never expressed any remorse in his five conversations with him about the crimes (Tr. 2208). Moreover, such arguments could also come from appellant's lack of emotion as he sat in court in front of the jury, not at his failure to take the stand. State v. Tokar, 918 S.W.2d 753, 769 (Mo.banc 1996)(The prosecutor properly argued, "There has been absolutely no remorse exhibited").

Additionally, appellant has not shown that the alleged errors could not have been cured by measures short of a mistrial, such as by an objection and an instruction to disregard. Nor has he shown that the argument had a decisive effect on the result of the trial.

X.

The trial court did not commit plain error in the penalty phase when it admitted into evidence without any objection from appellant the deposition of investigator Hartwick, which pertained to an undisputed matter, because appellant failed to show that manifest injustice occurred in that there is no evidence that appellant did not consent to being absent from the deposition, appellant's counsel can consent to the admission of evidence during a trial even though that involved the waiver of confrontation rights, and a different result would not have occurred if appellant had been present during the deposition.

Appellant alleges that the trial court committed plain error in the penalty phase when it admitted into evidence, without any objection from appellant, investigator Jim Hartwick's deposition in lieu of live testimony because appellant was not present at that deposition and appellant's counsel, rather than appellant, announced appellant's waiver of his confrontation rights in respect to the deposition (App.Br. 115; Tr. 2093; L.F. 665).

A. Relevant facts

The record shows that when the deposition to preserve Hartwick's testimony began, appellant's counsel announced "that we are waiving the appearance of confrontational rights of [appellant] with respect to this deposition" (L.F. 665). During the deposition, Hartwick testified that appellant shot at him in the St. Louis County Courthouse, which was a matter that was not in dispute (L.F. 677). The videotape of the deposition was played to the jury in the penalty phase without any objection and Hartwick did not testify (Tr. 2093). During appellant's closing argument, he did not dispute that he shot at Hartwick (Tr. 2244-2256). The jury specifically used this evidence to find that appellant guilty of a statutory aggravating factor

that the murder of Mary Baumruk was committed while appellant engaged in the attempted commission of the unlawful homicide of Hartwick (L.F. 1018;1029).

B. Standard of review and failure to show lack of waiver

Appellant admits that his claim is not preserved for review and is subject only to this Court's discretionary power to review for plain error (App.Br. 115). To be entitled to relief under the plain error rule, an appellant must go beyond a mere showing of demonstrable prejudice to show manifest prejudice affecting his substantial rights. State v. Winfield, 5 S.W.3d 505, 516 (Mo.banc 1999). The appellant must show that the error affected his rights so substantially that a miscarriage of justice or manifest injustice will occur if the error is

left uncorrected. Id.

This standard puts the burden on appellant, and he has not proven the facts alleged in his brief because there is no evidence that appellant did not personally waive his alleged right to be at the deposition by telling his counsel to go there and waive his right. Appellant's apparent assumption that his counsel was unaware of Clemmons v. Delo, 124 F.3d 944 (8th Cir.1997), and thus chose not to discuss the matter with appellant is not supported by the record. The facts of this case are distinguishable from those in Clemmons v. Delo because in that case there was affirmative evidence that the defendant did not consent to being absent from the deposition. Id. at 954.

It should be noted, that the federal court in Clemmons treated the direct appeal claim in that case as if it was fully preserved for appeal because Clemmons filed a motion to recall the mandate raising his claim of ineffective assistance of direct appeal counsel with this Court and this Court denied that motion without comment. Since this Court did not make an express finding on the preservation issue, the federal court found that it was not limited to review for plain error. Id. at 953,956. It then decided an ineffective

assistance of direct appeal counsel claim using the preserved direct appeal standard of review and evidence presented in a Rule 29.15 hearing that was not available to direct appeal counsel instead of Strickland analysis dealing with an unpreserved claim that was not supported by evidence. Id. at 954-956. However, since appellant has fully briefed the claim in question here, this Court has the opportunity to perform plain error review and avoid having a federal court consider the claim as if it was preserved for appeal.

C. Counsel may waive confrontation rights as to admissibility of evidence

Appellant's claim would fail even if there was evidence that appellant's counsel waived appellant's appearance without consulting with appellant. The Confrontation Clauses of the Missouri and Federal Constitutions provide the exact same protection. State v. Naucke, 829 S.W.2d 445, 454-456 (Mo.banc 1992). This question does not concern whether appellant had the right to be at the deposition, but whether his counsel could consent to the admission of the deposition into evidence without appellant's consent. The answer to that question is "yes." As the United States Supreme Court has stated:

> decisions by counsel are generally given effect as to what arguments to pursue, see Jones v. Barnes, 463 U.S. 745, 751...(1983), what evidentiary objections to raise, see Henry v. Mississippi, 379 U.S. 443, 451...(1965), and what agreements to conclude regarding the admission of evidence....

New York v. Hill, 120 S.Ct. 659, 664 (2000).

Courts frequently permit counsel to waive confrontation claims as to evidence such as by finding that counsel has waived objections to hearsay by not objecting to it. State v. Basile, 942 S.W.2d 342, 357 (Mo.banc 1997); State v. Aikens, 3 S.W.3d 792, 796 (Mo.App., W.D. 1996). They have recognized that counsel may waive a defendant's confrontation rights by making a strategic decision not to cross-examine a witness, Wilson v. Gray, 345 F.2d 282, 287-288 (9th Cir.1965), and by deciding not to object

to the admission of evidence. United States v. Plitman, 194 F.3d 59,63-64 (2nd Cir. 1999). In Plitman, for example, a federal circuit court rejected the analysis of Clemmons v. Delo, and stated, "We therefore join the majority of circuit courts of appeals and hold that defense counsel may waive a defendant's Sixth Amendment right to confrontation where the decision is one of trial tactics or strategy that might be considered sound." It explained that matters concerning the admissibility of evidence do not involve rights that only a defendant can waive, which included matters such as pleading guilty, waiving a jury trial, pursuing an appeal, and deciding not to testify, but instead involve tactical trial decisions that are for counsel to decide. Id. at 63. It explained that Brookhart v. Janis, 384 U.S. 1 (1966), which was relied on by the court in Clemmons, was irrelevant to this issue because that case did not involve merely a matter of trial tactics but implicated fundamental due process concerns. United States v. Plitman, supra at 63. In Brookhart, the defendant's counsel improperly agreed to the equivalent of a guilty plea without the client's consent and, as was discussed above, the decision to plead guilty rests with the client. United States v. Plitman, supra.

Other cases have recognized that counsel may waive confrontation rights if the defendant does not dissent from the decision. United States v. Stephens, 609 F.2d 230,233 (5th Cir.1980)(discusses other cases holding the same). Here, though, there is no evidence that appellant dissented with the decision of his counsel. The record shows that he did not raise an objection when the deposition was admitted into evidence (Tr.2092). It was up to appellant to prove that his absence was involuntary if he had a right to be at the deposition. State v. Molasky, 655 S.W.2d 663, 669 (Mo.App., E.D. 1983).

D. No manifest injustice

Nor has appellant shown that manifest injustice resulted from his absence from the deposition. It pertained to an undisputed matter, See State v. Wurtzberger, 40 S.W.3d 893, 898 (Mo.banc 2001),

which was that appellant shot at Hartwick . During appellant's closing argument, he did not dispute that he shot at Hartwick (Tr. 2244-2256). Appellant's presence at the deposition would not have changed anything. State v. Middleton, 998 S.W.2d 520, 526 (Mo.banc 1999). Appellant does not even attempt to show how manifest injustice could have resulted from him being absent from the deposition. Thus, his tenth point must fail.

XI.

The trial court did not commit plain error when it allowed appellant's counsel to waive appellant's presence after consulting with appellant at a hearing that occurred about three years before appellant's trial and that concerned, in part, appellant's motion for a change of venue because (1) appellant's presence was not required; (2) appellant's alleged right to be at the hearing was waived; and (3) manifest injustice did not result from appellant's absence.

Appellant alleges that the trial court committed plain error by allowing appellant's counsel to waive his presence after first consulting with him at a hearing that occurred in 1998, which was about three years before his trial, on the issues of change of judge and change of venue (App.Br. 118). Appellant does not allege that he was denied the right to be present for the motion for a change of judge, which was later reheard by Judge Cohen on August 2, 1999. See Point IV. Rather, he alleges that he was denied the right to be present for the change of venue matter, which was later taken up during appellant's trial in appellant's presence (Tr. 992–994). He claims that his presence was required at the hearing in 1998 as to the issue of change of venue because some of the people who were called in the mock-venire for that motion did not have strong memories concerning the shootings in that they said they could remember the events and appellant's face, but not his name (App.Br. 118).

A. Relevant facts

The record shows that appellant was transported to the courthouse by the State for the hearing on August 3,1998, before Judge Seigel (Tr. 4). Appellant's counsel consulted with him and then appellant went back to jail (Tr. 4-5). Appellant's counsel announced that they had decided as a matter of trial strategy that they did not want appellant to appear in court (Tr. 4). A prosecutor stated that he believed that the defense strategy was to hide appellant from the judge so that the judge would not see how competent appellant was (Tr. 5). Appellant's counsel at first denied having that motivation, but then stated that if that was the strategy it was legitimate because appellant could be harmed if he said something in court that showed that he was competent (Tr. 5).

The record does not show whether appellant had agreed with the advise of his counsel when the decision was made because he had not made any statements on the record and his counsel did not reveal the substance of their discussion. About two months later, appellant filed a pro se motion for a change of counsel that noted, among many other things, that he saw his counsel for about two minutes before the change of venue hearing and that he never saw the judge, but it did not state whether he had agreed on the date of the hearing with the decision of his counsel or whether he had recently changed his mind on the matter (L.F. 132).

At the start of appellant's trial, appellant's motion for a change of venue was relitigated in appellant's presence during the jury selection procedures (Tr. 992-994).

B. Standard of review

Appellant appears to concede that this claim is not preserved for appeal, because it was not raised at trial, State v. Hatton, 918 S.W.2d 790, 795 (Mo.banc 1996), or in his motion for a new trial. State v. Middleton, 998 S.W.2d 520, 525 (Mo.banc 1999). "The assertion of plain error places a much greater burden on a defendant than when he asserts prejudicial error." State v. Hunn, 821 S.W.2d 866, 869 (Mo.App., E.D. 1991). A defendant must not only show that prejudicial error occurred, he must further show that the error so substantially affects his rights that manifest injustice or a miscarriage of justice will inexorably result if left uncorrected. Id. at 869-870.

C. No violation of rights

Appellant has failed to show that any of his confrontation rights were violated. Under § 546.030, RSMo 1994, "No person indicted for a felony can be tried unless he be personally present during the trial."

> Under the statute: "The trial does not embrace every procedural and administrative step and judicial examination of every issue of fact and law." State v. Durham, 416 S.W.2d 79, 83 (Mo. 1967). A defendant's presence is not required at preliminary or formal proceedings or motions that do not affect guilt or innocence. Id.

State v. Middleton, supra at 525.

Article I, § 18 (a) of the Missouri Constitution provides: "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel." This right is broader than the statutory right discussed above. State v. Middleton, supra at 525.

Under the United States Constitution, a "defendant has a Sixth Amendment Confrontation Clause right to be present, and a due process right to be present, 'whenever his presence has a relation, reasonable

substantial, to fullness of his opportunity to defend against the charge...." State v. Smulls, 935 S.W.2d 9, 17 (Mo.banc 1996); United States v. Gagnon, 470 U.S. 522, 526 (1985).

In the case at bar, appellant did not have a right to be at the change of venue motion hearing three years before his trial because that was simply a hearing on a motion that did not concern his guilt or innocence, State v. Middleton, supra at 524-525 (defendant properly absent from pretrial hearings concerning the defendant's intent to use a mental disease or defect defense and the State's motion to file an amended information), and his presence did not have a reasonably substantial relationship to the fullness of appellant's opportunity to defend himself against the charge. State v. Smulls, supra at 17 (defendant properly absent from a hearing on a gender-Batson motion). Thus, it was a proper matter for counsel to exercise trial strategy. State v. Molasky, 655 S.W.2d 663, 669-670 (Mo.App., E.D. 1983).

This is especially true here because, as was discussed above, the ruling on the motion for a change venue was only interlocutory and was reconsidered before trial in appellant's presence. State v. Johnson,943 S.W.2d 285, 289 (Mo.App.,E.D.1997)(question of whether defendant was required to be at a hearing on motion to dismiss counsel need not be decided where the defendant was later given an opportunity to re-open his motion and personally make his argument).

D. Claim was waived

Additionally, the record shows that appellant's confrontation claim was waived. Neither appellant or his counsel requested that he be at the hearing, appellant's counsel stated that they were waiving appellant's right to be present, and there was no evidence that appellant did not agree with counsel's decision at that time. Waiver of this right can occur even if a defendant fails to directly state that he desires to waive this right and is not questioned on the matter. Such a waiver occurs when a defendant's counsel waives the defendant's right to be present for him, State v. Malone, 951 S.W.2d 725,731-732

(Mo.App.,W.D.1997); State v. Tunstall, 848 S.W.2d 530,534 (Mo.App.,E.D.1993); State v. Sanders, 539 S.W.2d 458,461 (Mo.App.St.L.D.1976), when neither the defendant or his counsel requests the defendant's presence, State v. Middleton, supra at 525; State v. Madison, 997 S.W.2d 16,21-22 (Mo.banc 1999); United States v. Gagnon, 470 U.S. 524, 522 (1985); United States v. Gunter, 631 F.2d 583,589 (8th Cir.1980); when a defendant fails to appear, State v. White, 669 S.W.2d 220,221 (Mo.App.,E.D.1983); Illinois v. Allen, 397 U.S. 337,338 (1970), when a defendant voluntarily absents himself from the courtroom, State v. Knese, 985 S.W.2d 759,776 (Mo.banc 1999); Crosby v. United States, 506 U.S. 255 (1993); Taylor v. United States, 414 U.S. 17 (1973), or when a defendant commits conduct for the purpose of preventing his presence in the courtroom, State v. Bowens, 964 S.W.2d 232,239 (Mo.App.,E.D.1998).

Appellant argues that incarcerated defendants and capital defendants can never waive their right to be present (App.Br.120). However, this is premise has been rejected by this Court. State v. Drope, 462 S.W.2d 677,683-684 (Mo.1971); see also State v. Black, 50 S.W.3d 778,787 (Mo.banc 2001), and State v. Knese, supra.

Appellant's argument is based on what he claims is implied, but not held, by Diaz v. United States, 223 U.S. 442, 455 (1912) and Crosby v. United States, supra at 260. However, the statement in Diaz, which is not a death penalty case, that a defendant cannot waive his right to be present at a trial if he is in custody and the death penalty is being pursued was not a statement of law, but simply a statement of facts as they existed in 1912 and do not exist today. That is, that defendants in custody in 1912 or defendants who were charged with capital offenses in 1912, and thus were necessarily in custody, did not have the ability to determine whether they were present during the trial, because the government would not allow them to leave. A discussion of this fact and cases showing that this dicta from Diaz is not being followed

as appellant suggests is found in State v. Durkin, 595 A.2d 826,831 (Conn.1991).

While the language in question from Diaz has been cited with approval in Crosby v. United States, supra 506 U.S. at 260, it was only mentioned in a discussion of the history behind Fed. Rules Crim.Proc. 43, which does not require the defendant to be present during his trial *if* the defendant was present when the trial began. It did not claim that this discussion had anything to do with the Federal Constitution. Rather, it explained that the language that the case could be tried in the defendant's absence if it had begun in his presence had been codified into Rule 43. Id. at 259-260. Its holding was that the language, history, and logic of Federal Rule 43 prohibited a trial in absentia unless the defendant had been present when the trial started. Id. at 262. It also stated, "[b]ecause we find Rule 43 dispositive, we do not reach Crosby's claim that his trial *in absentia* was also prohibited by the Constitution." Id. Moreover, this case does not involve the defendant's waiver of a right to be present during his trial, but simply the waiver of his presence at a proceeding that occurred years before his trail.

E. No manifest injustice

Additionally, appellant has failed to show that manifest injustice resulted from his absence from the hearing three years before his trial. State v. Middleton, supra at 526. Since the change of venue motion was reopened at the time of appellant's trial in appellant's presence, it is obvious appellant's claim is without merit.

XII.

The trial court did not commit plain error in the guilt phase when it allowed witnesses Pollard, Seltzer, and Salamon to testify that they were married, had children, and that one of them had grandchildren because the trial court has discretion to allow the presentation of limited biographical information and manifest injustice did not occur in light of the innocuous nature of this testimony and the overwhelming evidence of appellant's guilt.

Appellant alleges that the trial court committed plain error in the guilt-phase when it permitted three of the State's witnesses to give limited biographical information during their testimony (App.Br.124). He appears to claim that this was victim impact evidence that was not admissible until the penalty-phase (App.Br. 126). He states that this claim is not preserved for review because it was not raised in his motion for a new trial (App.Br. 125).[13] The evidence in question is that attorney Scott Pollard testified that he was married, had two children and three grandchildren (Tr. 1854). Attorney Garry Seltzer testified that he was married and had two sons, aged nineteen and twenty-one (Tr. 1918). Police Officer Steven Salamon testified that he was married and had four children (Tr. 1954).

While the trial court could have properly excluded this evidence as being irrelevant in the guilt phase, it had discretion to permit the introduction of limited biographical information. State v. Clemmons,

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[13] Lack of preservation also results from appellant's failure to object to all of the testimony in question (Tr.1854,1918,1954).

400 S.W.2d 541, 546 (Mo. 1970). As appellant appears to recognize, such evidence is frequently adduced at the beginning of the testimony of witnesses, as occurred here, for the purpose of making them feel comfortable on the stand before going into the shocking details of crimes (App.Br. 126).

Moreover, appellant has failed to show that the admission of the evidence resulted in manifest injustice because, in light of the innocuous nature of this evidence and the overwhelming evidence of his guilt, the admission of the evidence was not outcome-determinative. State v. Roberts, 948 S.W.2d 577, 592 (Mo.banc 1997)(improperly admitted evidence of other crimes did not result in manifest injustice).

The only disputed issue in the guilt phase was whether appellant deliberated. The State established this by showing that appellant purchased guns for the purpose of murdering his wife, repeatedly told his co-workers that he was going to shoot his wife and the lawyers and the judge, that he flew to St. Louis with the two guns for the purpose of murdering his wife, that appellant never intended to complete the divorce litigation because he had not filled out the papers that were required for that case, and that during the hearing on that matter, calmly shot and killed his wife and then attempted to kill the attorneys and judge pursuant to his long-standing plan (Tr.1679, 1705, 1724-1726, 1730-1742, 1778-1780, 1790, 1798, 1804,1816-1817,1829,1879-1881,1932,1937-1938,1946-1950; State's Exhibit 26A-C). Appellant did not testify on his own behalf or present the testimony of any witnesses in the guilt phase. Under these circumstances, it is difficult to imagine a stronger case of deliberation and appellant cannot show that the evidence is question was outcome-determinative. Thus, his twelfth point must fail.

XIII.

The trial court did not abuse its discretion in the guilt phase when it refused to admit Defense Exhibits A and B, pleadings filed in appellant's divorce case, because they were hearsay, and appellant could not have been prejudiced by the trial court's actions in that these exhibits did not show that appellant did not deliberate, other evidence of a similar tenor that was not hearsay was presented to the jury, and there was overwhelming evidence of appellant's guilt.

Appellant alleges that the trial court abused its discretion when it refused to admit into evidence Defendant's Exhibits A and B, which are pleadings that were allegedly signed and filed by appellant about a year and a half before the murder in his divorce case as to the issue of the division of property (App.Br.128). Appellant alleges that these documents, from October of 1990, show facts pertaining to his dispute with the murder victim about who would get custody of their house (App.Br.130). These exhibits were excluded on the ground that they were hearsay and that appellant sought to use the statements in those documents for the truth of the matters asserted therein (Tr. 1899-1907). Appellant claims that they were admissible because they are not hearsay (App.Br.128).

"A hearsay statement is any out-of-court statement offered to prove the truth of the matter asserted therein." State v. Chambers, 891 S.W.2d 93,102 (Mo.banc 1994). Appellant's argument is that the evidence was not hearsay because "[d]efense counsel did not want to prove the truth of these exhibits; he wanted to disprove deliberation" (App.Br. 130).

However, appellant was improperly attempting to use the evidence for the truth of the matters asserted therein because the evidence would prove nothing if this was not done. If appellant was not the person who made the allegations, as the exhibits alleged, and if all of the allegations in the exhibits were

false, the exhibits proved nothing. It is obvious from appellant's brief that he is still using the exhibits for the truth of the matters asserted in the exhibits (App.Br. 130).

This case is similar to State v. Shire, 850 S.W.2d 923, 932 (Mo.App., S.D. 1993). In that murder case, the defendant claimed that the trial court erred by refusing to admit her diary into evidence because it "showed her mental state in the weeks prior to the shooting, and 'was probative to her defense of mental disease or defect and did not constitute self-serving hearsay.'" The Court of Appeals rejected this and found that a defendant is not permitted to create evidence by adducing testimony of his own self-serving act or declaration that is independent of the res gestae of the crime. Id.(citing State v. Brooks, 360 S.W.2d 622, 627 (Mo.1962)(self-serving declaration made two months before offense)).

Moreover, appellant could not have been prejudiced by the exclusion of the evidence because evidence that appellant was upset with his future murder victim about a year and a half before he murdered her is not evidence of lack of deliberation. It is evidence of motive that can be used to prove deliberation. See State v. Brown, 867 S.W.2d 530, 534 (Mo.App., W.D. 1993).

Additionally, appellant could not have been prejudiced by the exclusion of this evidence even if it was relevant to proving lack of deliberation because lots of similar evidence was adduced. That evidence showed that appellant had been removed from the home in about August 29, 1990, by the filing of an adult abuse action by Mary Baumruk, and that possession of the home had been returned to him in late spring or summer of 1991, which was long before the murder (Tr. 1909-1911). Appellant told his co-workers at Boeing that he was upset that he was going to lose his family home in the divorce and that if things did not go his way he planned on shooting his ex-wife right between the eyes and on shooting the lawyers and the judge (Tr. 1778-1780, 1815-1817).

Further, appellant could not have been prejudiced because, as was discussed in detail in Point XII,

there was overwhelming evidence of his guilt. Thus, his thirteenth point must fail.[14]

[14] Appellant also claims that the prosecutor made improper arguments regarding this evidence (App.Br.128). However, those allegations were addressed in Point IX of this brief and will not be addressed further here.

XIV.

Appellant's claim that the trial court abuse its discretion in the guilt phase when it sustained the State's objection to a question to State's witness Scott Pollard, who was the attorney who represented the murder victim in the divorce proceeding, "regarding the conflict of interest" is not preserved for appeal and cannot be reviewed because appellant failed to make an offer of proof showing exactly what testimony was excluded. Moreover, plain error did not occur because Pollard was questioned on that matter and manifest injustice did not result from the trial court's actions.

Appellant alleges that the trial court abused its discretion in the guilt phase when it sustained the State's objection when appellant's counsel attempted to question Mary Baumruk's attorney, Scott Pollard, "regarding the conflict of interest" (App.Br.135; Tr. 1887). Appellant alleges this matter pertained to whether he deliberated (App.Br. 135).

The objection in question arose during the following discussion:

Q When a client goes to an attorney - -

MR. WALDEMER: I object as to the relevance of it at this point.

(Tr. 1887). Out of the presence of the jury, appellant's counsel explained that the inquiry was relevant to show that appellant was mad because his former lawyer was now on the other side and any possible information given to him could be used against him (Tr.1888). However, the prosecutor disputed that Pollard was going to testify as to anything like that (Tr.1888). The prosecutor also pointed out that the evidence that was presented showed that appellant had agreed to waive the conflict of interest and that appellant was simply attempting to impeach Pollard with evidence of "some sort of prior bad act"(Tr.1888). The trial court found that the evidence in question was irrelevant and sustained the objection

(Tr.1888).

Appellant's claim is not preserved for appeal and appellant has failed to show that he could have adduced any additional admissible evidence because appellant failed to make an offer of proof. State v. Clay, 975 S.W.2d 121, 130 (Mo.banc 1998); State v. Johnson, 858 S.W.2d 254, 256 (Mo.App., E.D. 1993); State v. Edwards, 918 S.W.2d 841, 845 (Mo.App.,W.D. 1996). It is unclear exactly what question appellant's counsel wanted to ask and how Pollard would have answered that question. Thus, there is nothing for this Court to review and appellant's fourteenth point must fail.

Moreover, plain error could not have occurred because the record shows that the trial court allowed counsel to question Pollard on the matter of his alleged conflict of interest and appellant failed to show that any relevant testimony was excluded. The evidence presented showed that on May 1, 1992, Pollard discovered that he had represented appellant in a motion to modify in another divorce case about fifteen years earlier (State's Exhibit 8; Tr. 1870). He was shocked to see this because he did not remember that he had represented appellant (Tr. 1870).[15] He said that it presented a potential conflict of interest for him to be representing a party against appellant in light of his representation of appellant in the past (Tr. 1871). He never would have taken the case if he had known that he had previously represented appellant (Tr. 1887). Pollard believed that he was ethically obligated to inform his client and the other party of this matter (Tr. 1871). He unsuccessfully attempted to contact appellant's counsel, Garry Seltzer, and Mary Baumruk before the day of the hearing (Tr. 1871). On the morning of the hearing, May 5, 1992, he told Seltzer and Mary Baumruk (Tr. 1873). The attorneys and Judge Hais met in chambers and Judge Hais decided that the case could continue if all the parties agreed on the record to waive any conflict of interest

[15]There was no evidence as to whether appellant remembered employing Pollard.

(Tr. 1927). Seltzer then discussed the matter with appellant (Tr.1927).

When the case started, appellant, Seltzer, Mary Baumruk and Pollard were sitting together at a table in the front of the courtroom by Judge Hais (Tr.1723). Judge Hais and the attorneys made a record about waiving the conflict of interest, and Seltzer indicated that appellant was willing to waive the conflict (State's Exhibit 8). As Mary Baumruk stated on the record that she was willing to waive the conflict of interest, appellant killed her (Tr.1877-1879; State's Exhibit 8).

The above shows that the issue of Pollard's alleged conflict of interest was fully developed during appellant's trial. In light of that fact and the overwhelming evidence of appellant's guilt, appellant has failed to show that manifest injustice resulted from the trial court's actions.

XV.

The trial court did not abuse its discretion when it admitted the audiotape of the murder and the events surrounding the murder in the courtroom because it was legally relevant to assist the jury to understand the facts and testimony of witnesses, the timetable of events, and to show that appellant deliberated in the murder.

Appellant alleges that the trial court abused its discretion in the guilt phase when it admitted into evidence an audiotape of what occurred in the courtroom when appellant murdered Mary Baumruk, State's Exhibit 8, because playing the tape of appellant's crimes was too prejudicial and made the jury into witnesses of the murder (App.Br. 139). He claims that evidence of what occurred in the courtroom around the time that he committed the murder did not help to prove his intent, which was the only issue in dispute (App.Br. 140).[16]

Although appellant's claim of lack of deliberation was based, in part, on argument, but not evidence, that he allegedly became mad upon hearing that the victim's lawyer had a conflict of interest, the audiotape shows that calm and orderly proceeding were occurring in the courtroom and that appellant sat through those proceedings for a substantial period of time, instead of immediately attacking anyone.

State's Exhibit 8 shows that the trial court went on the record and discussed preliminary matters and then said that it needed to make a record concerning a conflict of interest claim that had been brought to its attention (State's Exhibit 8). In that exhibit, Mary Baumruk's attorney, Scott Pollard, made a lengthy record regarding how he found out about the potential conflict, about how he disclosed it to Mary Baumruk,

[16] A transcript of State's Exhibit 8 is found in the legal file (L.F. 55-61).

and that she was willing to waive the conflict (State's Exhibit 8).

Appellant's counsel, Garry Seltzer went on the record and explained how he heard of the potential conflict, that he spoke to appellant about it, that he explained to appellant what this meant, and that appellant had indicated that he was willing to waive the conflict and proceed with the case (State's Exhibit 8).

The Judge Hais then engaged in a long discussion concerning the law in this area and the record that was needed if the parties wanted to waive the conflict of interest (State's Exhibit 8).

Pollard then began making a record on the waiver by questioning Mary Baumruk about it (State's Exhibit 8). He asked her a series of questions, and she answered them and indicated that she was willing to waive the conflict (State's Exhibit 8). After she waived the conflict, the shooting began (State's Exhibit 8).

The tape was played to the jury during the testimony of the State's first witness, court clerk Sandy Woolbright, and during the State's closing argument (Tr. 1687,2008).

The trial court had broad discretion in deciding on the admissibility of the audiotape. State v. Wahby, 775 S.W.2d 147, 153 (Mo.banc 1989). "Despite being aurally startling or disturbing, a tape recording is admissible to assist the jury to understand the facts or testimony of witnesses, the timetable of events, or to establish any of the elements of the State's case." State v. Isa, 850 S.W.2d 876, 893 (Mo.banc 1993)(trial court properly admitted surveillance audiotapes of the victim's parents stabbing her to death). Defendants may not escape the brutality of their own actions by suppressing gruesome, yet probative evidence, because gruesome crimes produce gruesome evidence. State v. Feltrop, 803 S.W.2d 1, 11 (Mo.banc 1991)(trial court properly admitted photographs of the victim's body, which had been cut into numerous pieces).

In the case at bar, the audiotape was legally relevant because it helped the jury to understand the testimony of the witness who testified before it was admitted and many of the following witnesses by showing exactly what occurred in the courtroom prior to, during and immediately after the murder. It was the most important piece of evidence for establishing the timetable of events in the courtroom. As was mentioned above, it also helped to show that appellant deliberated because it showed that appellant did not immediately attack anyone upon hearing that the victim's lawyer had a conflict of interest, but that he quietly sat through the proceedings, deliberating, and waited until what he perceived was the right moment in time to execute his attack. As in State v. Isa, supra at 893, appellant's "real concern is that this tape is too probative,"and "[i]ts only potential prejudice to [appellant] is that it let the jury hear the truth first hand." Thus, the trial court did not abuse its discretion when it admitted the tape.

XVI.

The trial court did not err in the penalty phase by refusing to submit appellant's proposed "Instruction A" that contained the statutory mitigating circumstance of "Whether the murder of Mary Baumruk was committed while the defendant was under the influence of extreme mental or emotional disturbance" because that language was not supported by the evidence. Further, appellant could not have been prejudiced by the lack of that language because Instruction 16 contained a "catch-all" paragraph that permitted the jury to consider any other circumstances from the evidence that mitigated punishment.

Appellant claims that the trial court erred when it refused to submit appellant's proposed "Instruction A" that contained the statutory mitigating circumstance "Whether the murder of Mary Baumruk was committed while the defendant was under the influence of extreme mental or emotional disturbance" because that circumstance was allegedly supported by the evidence (App.Br.144; L.F. 1028).

The evidence relied on by appellant shows that appellant and his family grew up next door to his aunt Emma and his uncle Ken, who both died around 1988 (Hammack-Tr. 93,99).[17] Appellant's mother died in 1990 (Hammack-Tr.100). In August of 1990, Mary Baumruk filed for divorce (Tr. 1716,1855-1858). Also in August, she removed him from their home by the filing of an adult abuse action, but the possession of the home was returned to him in late spring or summer of 1991 (Tr.1909-1911). [18]

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[17]Respondent will ignore appellant's improper citations to exhibits that were not admitted into evidence (App.Br.145). He refers to these exhibits as "Refused Exs.A,B; AppendixA80-92")

[18]Appellant possessed the home before the marriage, but marital funds were used to make house

Appellant repeatedly told his co-workers at Boeing that if everything did not go his way in the divorce he would shoot his wife and the attorneys and the judge (Tr.1778-1780,1816). Before the divorce hearing, appellant's counsel told appellant about the potential conflict of interest that Scott Pollard had, but the record does not show whether appellant was already aware of the fact that he had previously been represented by Pollard (Tr.1927). Garry Seltzer indicated that appellant was willing to waive the conflict of interest (State's Exhibit 8). Appellant allowed the divorce hearing to start and proceed for about five minutes on the issue of the conflict of interest, waited until Mary Baumruk also waived that conflict of interest, and then he calmly and methodically started his attack (State's Exhibit 8; Tr. 1878-1884).

Defense psychologist Dr. Daniel Cuneo testified that he reviewed information about what was going on in appellant's life up to the time of the shooting and said that he could not give an opinion as to appellant's state of mind at the time of the shooting, but that appellant did not have a history of psychiatric problems before the May 5, 1992, and that he had been

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payments during the marriage (Tr.1910).

functioning as an electrical production planner (Tr.2161,2171,2179).[19]

The trial court is only required to submit a statutory mitigating circumstance to the jury if it is supported by the evidence, MAI-CR 3d 313.44B, Notes on Use 4, and the evidence did not show that appellant was suffering from a extreme mental or emotional disturbance at the time of the murder, or that such a disturbance was a cause of the murder. No witness said that appellant showed any signs of mental or emotional disturbance, let alone an extreme mental or emotional disturbance. Appellant's own expert witness, Dr. Cuneo, could not even testify about appellant suffering from an extreme mental or emotional disturbance. In fact, he said that appellant did not have a history of psychiatric problems before the day of the murder (Tr. 2179). If there was insufficient evidence for appellant's expert to find that appellant had an extreme mental or emotional disturbance, there certainly was insufficient evidence for jurors to make such a finding.

Further, there was no evidence of that type of a disturbance being a cause for appellant's actions and that appellant had no control over his actions. On the contrary, showed that appellant engaged in a

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[19]Respondent will also ignore appellant's improper citations to statements by Cuneo as to what he was told about what occurred in appellant's life because that testimony was not admissible for the truth of the matters asserted, a hearsay purpose, but simply for the purpose of showing what Cuneo relied on to reach his findings (App.Br.145). State v. Gary, 913 S.W.2d 822,830 (Mo.App.,E.D.1995).

deliberate murder after lengthy planning and preparation. This murder was caused by appellant's evil disposition, rather than from an extreme mental or emotional disturbance. See State v. Wise, 879 S.W.2d 494,518 (Mo.banc 1994)(evidence that the defendant was using cocaine and was desperate for money to buy drugs was not evidence of an extreme mental or emotional disturbance); State v. Young, 701 S.W.2d 429,437 (Mo.banc 1985)(evidence that the defendant was angry because of a prior confrontation with a person was not evidence of an extreme mental or emotional disturbance); Strickland v. Washington, 466 U.S. 668,672,700 (1984)(dealt with evidence of considerable emotional distress caused by the defendant's inability to support his family that did *not* rise to the level extreme emotional disturbance).

Appellant asserts that the law concerning the use of the term "under the influence of extreme emotional disturbance," which was an element of assault in the second degree under § 565.060, RSMo 1978, is instructive on this issue (App.Br.146). Those cases make it clear that the extreme emotional disturbance must be a cause of the crime, rather than the crime being "entirely" the result of "the defendant's evil disposition." State v. Hajek, 716 S.W.2d 481, 484 (Mo.App.,E.D.1986).

For example in State v. Ellis, 639 S.W.2d 420,424 (Mo.App.,W.D.1982), the defendant claimed that there was evidence to support the lesser included offense of assault in the second degree because the victim, who was a fellow prison inmate, had been pressing him to engage in homosexual activity and that his fear of being raped caused him to stab the victim under extreme emotional disturbance. However, the Court of Appeals rejected this, finding that the evidence showed a calculated attack that had been planned the day before rather than an attack that was motivated by extreme emotional disturbance. Id.

Similarly, in State v. Thompson, 705 S.W.2d 38,40-41 (Mo.App.,E.D.1985), the defendant claimed that there was evidence that he was under extreme emotional distress because on the day of the incident he drank twelve beers, smoked two or three marijuana cigarettes, was under a lot of pressure

working for his father, and he was quite concerned about his mother who had triple bypass surgery. The Court of appeals rejected this argument, finding that "[t]here was not medical evidence of mental disease or defect and no evidence that he was compelled by circumstances beyond his control to commit a burglary and the subsequent assault. We find insufficient evidence to warrant evidence of defendant's extreme emotional disturbance instructions." Id.

State v. Nunn, 646 S.W.2d 55,57 (Mo.banc 1983), an assault case which is relied on by appellant, is distinguishable from the case at bar. In that case, unlike the case at bar, there was substantial direct evidence of the defendant's mental state from the defendant himself, who thought that the victim was responsible for him being shot at right before he assaulted her, and there was substantial evidence that this emotional disturbance was the cause of the assault. That case was reversed because of the trial court's failure to give a converse instruction on that element of assault in the second degree. The case at bar, moreover, does not pertain to the element of an offense, but simply to a mitigating circumstance.

Even had there been evidence supporting this statutory mitigating circumstance, appellant could not have been prejudiced because appellant was allowed to argue the mitigating evidence that pertained to the circumstance in question the jury was able to give it legal effect in that Instruction 16 contained a "catch-all paragraph" that said, "You may also consider any other circumstances which you find from the evidence in mitigation of punishment" (Tr. 2246-2247; L.F. 1022-1023). State v. Clayton, 955 S.W.2d 468,478 (1999); Sate v. Middleton, 995 S.W.2d 443,464 (Mo.banc 1999).

This is similar to Buchanon v. Angelone, 118 S.Ct. 757 (1998). In that case, the jury was instructed that if it found a statutory aggravating circumstance "then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." The trial court refused to submit as

mitigating circumstances four factors, including extreme mental or emotional disturbance. Id. at 760. The United States Supreme Court affirmed the defendant's conviction, finding that these instructions were proper because they did not foreclose the jury from considering any mitigating evidence. Id. at 762. It stated, "By directing the jury to base its decision on 'all the evidence,' the instruction afforded the jurors an opportunity to consider mitigating evidence." Id. Thus, appellant's sixteenth point must fail.

XVII.

The trial court did not commit plain error in the penalty phase when it submitted to the jury Instruction 14, the instruction submitting statutory aggravating circumstances, because appellant's theory that the statutory aggravating circumstances listed in that instructions were improperly duplicative is without merit.

Appellant alleges that the trial court committed plain error when it submitted Instruction 14, on statutory aggravating circumstances, because the ten statutory aggravating circumstances were duplicative (App.Br.149). Appellant concedes that this claim is not preserved for review because it was raised for the first time on appeal (App.Br.150).

The instruction in question submitted as eight circumstances that appellant murdered Mary Baumruk while he was attempting the commission of homicides of eight different people, § 565.032.2(2), RSMo 2000, that the defendant by the act of murdering Mary Baumruk knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person, § 565.032.2(3) and that the murder involved depravity of mind because it was part of a plan to kill more than one person and appellant thereby exhibited a callous disregard for the sanctity of all human life, § 565.032.2(7) (L.F. 1015-1020).

In Missouri, a statutory aggravating circumstance is a legal conclusion whose only function is to limit the discretion of the sentencer in a capital case by premising a defendant's eligibility for the death penalty upon the proof of specifically-defined facts. Tuilaepa v. California, 512 U.S. 967,971-972 (1994); State v. Worthington, 8 S.W.3d 83,88 (Mo.banc 1999). In "non-weighing" states such as Missouri, "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible

for the death penalty." Zant v. Stephens, 462 U.S. 862, 873-874 (1983); see State v. Brooks, 960 S.W.2d 479,496 (Mo.banc 1997)(Missouri is a "nonweighing" state). Instead, the sentencer considers all of the evidence in arriving at a decision on punishment. Stringer v. Black, 503 U.S. 222, 229-230 (1992); State v. Worthington, supra, 8 S.W.3d at 88.

Appellant's claim that improper duplication can occur has been rejected by this Court. State v. Christeson, 50 S.W.3d 251,270 (Mo.banc 2001). Since statutory aggravating circumstances merely open the door to consideration of capital punishment, at which point the jury considers all the evidence, appellant's "duplication" theory is meaningless. State v. Brown, 902 S.W.2d 278, 293 (Mo.banc 1995); State v. Ramsey, 864 S.W.2d 320,337 (Mo.banc 1993). Even if duplication occurred, it would not be prejudicial. State v. Brown, supra at 293. Thus, appellant's seventeenth point must fail.

XVIII.

This Court should, in the exercise of its independent statutory review, affirm appellant's sentence of death because (1) this sentence was not imposed under the influence of passion prejudice or any or arbitrary factor; (2) the evidence supports the jury's finding of aggravating circumstances, and (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant.

Appellant has chosen not to contest that this Court should affirm his sentence after conducting its mandatory review of his sentence by electing not to brief this issue.

Under the mandatory independent review contained in §565.035.3, RSMo 2000, this Court has to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime the strength of the evidence and the defendant.

This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. State v. Ramsey, 864 S.W.2d 320,328 (Mo. banc 1993).

A. Sentence was not imposed under the influence of passion, prejudice, or any

other improper factor

The record shows that appellant's sentence was not imposed under the influence of prejudice, passion or any other improper factor. Appellant presents no argument on this matter.

B. Statutory aggravating circumstances are valid

It is undisputed that the evidence supports jury's findings of the statutory aggravating circumstances that the murder occurred while appellant was engaged in the attempted commission of another eight other homicides, that appellant by his act of murder knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person, and that the murder was outrageously or wantonly vile, horrible or inhuman because it involved depravity of mind in that appellant killed Mary Baumruk as part of a plan to kill more than one person and, thereby exhibited a callous disregard for the sanctity of all human life § 565.032.2 (2),(3) and (7), RSMo 2000.

C. Sentence is not disproportionate

Appellant does not dispute that his sentence is not disproportionate to the penalty imposed in other similar cases, considering the crime, the strength of the evidence, and the defendant. Appellant is deserving of the death penalty because he coldly calculated and planned over a lengthy period of time about how he was going to commit mass murder, and succeeded in murdering one person and wounding four people before being captured after a gun battle with law enforcement officers. This case is similar to other death-penalty cases that involved planned mass murders. See State v. Franklin, 969 S.W.2d 743 (Mo.banc 1988);

State v. Johnson, 968 S.W.2d 123 (Mo.banc 1998); State v. Middleton, 998 S.W.2d 520 (Mo.banc 1999); State v. Christeson, 50 S.W.3d 251 (Mo.banc 2001); State v. Sloan, 756 S.W.2d 503 (Mo.banc

1988). As in cases like State v. Barton, 998 S.W.2d 19 (Mo.banc 1999), and State v. Clayton, 995 S.W.2d 468 (Mo.banc 1999), appellant committed an execution-style murdered a person who was defenseless. Appellant shot Mary Baumruk in the neck, while she was sitting across from him and unaware of what he was doing (Tr. 1679,1705,1724-1725,1790,1879). After shooting their attorneys, he walked up to Mary Baumruk, placed a pistol up against the base of her heard and shot her again – killing her (Tr. 1798,1804,1933). Appellant was a remorseless killer (Tr. 2208). State v. Morrow, 978 S.W.2d 100,119 (Mo.banc 1998). Additionally, there was overwhelming evidence of appellant's guilt. Thus, his sentence was not excessive or disproportionate.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 25,861 words, excluding the cover, this certification, and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 19th day of April, 2002, to:

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